Spencer Foods, Inc. *and* United Food and Commercial Workers International Union, Local 152, AFL-CIO. Case 18-CA-6256

1 March 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 2 July 1981 Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed cross-exceptions and a supporting brief. The Respondent then filed a brief in opposition to the Charging Party's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The judge found, and we agree, that the Respondent violated Section 8(a)(1) by telling two job applicants that they would not be considered for future employment if they honored a lawful union picket line. The judge further found that the Respondent violated Section 8(a)(3) by establishing criteria for the recall of laid-off employees designed to disqualify them from future employment and by applying those criteria in a discriminatory manner in order to eliminate the Union as the employees' collective-bargaining representative. We agree that the Respondent violated Section 8(a)(3), but we do so for the reasons set forth below. Finally, the judge found that the Respondent, after its acquisition by Land O' Lakes, remained the "same continuing employing entity" and that as such it violated Section 8(a)(5) by withdrawing recognition from the Union, by refusing to bargain with the Union, and by unilaterally establishing hiring eligibility criteria.

The Respondent has excepted, inter alia, to the judge's 8(a)(5) findings on the basis that because of a total change in ownership accompanied by substantial changes in management and plant operations the Respondent was extinguished and replaced by a new employing entity operated and controlled by Land O' Lakes. The Respondent contends, and we agree, that traditional successorship principles should be applied to determine whether the Respondent is subject under Section 8(a)(5) to any labor relations obligations which Spencer Foods had prior to its acquisition by Land O' Lakes. Since, as discussed below, the essence of the successorship doctrine is that such obligations depend on the degree of continuity in the employing enterprise, we further agree with the Respondent that an examination of the factors on which the Board traditionally relies to evaluate continuity here warrant a finding that the Respondent under Land O' Lakes' ownership is not a successor to the original Spencer Foods, Inc. We shall therefore dismiss the 8(a)(5) allegations in the complaint.

The facts are more fully set forth in the judge's decision. The Respondent's Spencer facility is a beef slaughtering and fabrication plant. In 1977 the Respondent also operated five other plants including another slaughtering plant in Schuyler, Nebraska. The Union represented a unit of production and maintenance employees at the Spencer plant from 1952 until 31 October 1977 when the Respondent lawfully closed that facility for economic reasons. At the time the Spencer operation closed the plant employed approximately 420 unit employees.[3]

The Spencer facility remained closed for 16 months. The Respondent informed the employees that it would attempt to sell the plant. The Respondent maintained its corporate headquarters at Spencer and employed a small work force engaged in caretaker functions there. In an attempt to sell the Spencer plant the Respondent negotiated with Land O' Lakes, Inc.[4] which sought to purchase only the assets of the Spencer and Schuyler plants. Both parties subsequently abandoned this strategy because of Federal tax considerations. Land O' Lakes eventually accomplished its objective by

[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

[2] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

None of the following minor errors in the judge's decision materially affect his findings or analysis: During the summer and fall of 1978, Union President Lauritsen continued to request, not receive, information as to the stock tender offer; Land O' Lakes informed the Union in November 1978, not 1977, that it had no employees in Spencer and had no intention of hiring any. Land O' Lakes' Industrial Relations Director Huron did not explain why, in January 1979, there was need to hire a "totally new work force" given the lack of any specific instructions from Land O' Lakes' Vice President Dudley; the hiring criterion as to wage expectations was #3, not #2. Employee Darryl Frerichs stopped working at the Spencer plant on 26 February 1979 because of the picket line. He told his foreman why he had stopped working, but later returned to work on 6 March 1979. Finally, the General Counsel agrees with the Union that the 8(a)(5) issue is not properly analyzed under successorship criteria.

[3] The Schuyler facility continued to operate without interruption.

[4] Land O' Lakes is a cooperative with corporate headquarters located in Minneapolis, Minnesota. The sole shareholders are farmers who produce or sell to Land O' Lakes or buy goods and services from it.

purchasing the stock of the Respondent. In October 1978 Land O' Lakes issued a tender offer. Ninety-five percent of the shares were acquired by 27 October and the balance was later acquired by a reverse stock split plan. Because Land O' Lakes' interest was only in the Respondent's Spencer and Schuyler facilities, it obtained warrants from several of the Respondent's major shareholders pursuant to which those shareholders would purchase the four unwanted Spencer Foods facilities in the event those facilities could not otherwise be sold. The major shareholders also assumed responsibility for certain lawsuits instituted prior to the stock sale.

After acquiring sole ownership of the Respondent, Land O' Lakes effected certain changes in Respondent's corporate structure and operation. Spencer Foods, Inc. became a corporate subsidiary of Land O' Lakes with headquarters remaining in Spencer, Iowa. The Spencer facility reopened in February 1979 and the four unwanted facilities were disposed of under the purchase warrants. The Respondent thereafter operated as a two-plant enterprise. The Respondent's articles of incorporation were changed to permit it to operate as a farmer's cooperative.

The new ownership of Land O' Lakes was reflected in the election of an entirely new board of directors. The president of Spencer Foods remained in charge of day-to-day operations for Land O' Lakes but he no longer sat on the board. Land O' Lakes hired a new plant manager and new supervisors for the Spencer facility. A majority of the supervisors had not been previously employed by Spencer Foods.

Land O' Lakes made further changes regarding the operations of the Spencer facility itself. It eliminated one of the two work shifts and thus reduced the original 420 employee complement to approximately 240. Land O' Lakes also converted the Spencer facility to a solely kosher operation and in so doing modified its old customer list and also added new kosher accounts. Additionally, Land O' Lakes began purchasing cattle from its own members. It also continued to draw upon local sources. Land O' Lakes spent approximately $1,300,000 or equivalent to about 10 percent of the purchase price on plant improvements. While some improvements were cosmetic such as painting and plastering others were substantive in nature. For example, the Respondent extended the length of the kill chain, installed new and more modern equipment, and modified production steps and job assignments. These changes impacted on productivity in that they resulted in the faster movement of hides within the plant.

In January 1979 the Respondent began hiring for its scheduled February reopening of the Spencer plant. The Respondent's witnesses testified that Land O' Lakes executives concluded that the old work force as a whole was unsatisfactory because of low productivity and high absenteeism as well as excessive workmen's compensation costs. The Respondent contends that in order to procure the best possible work force it developed and implemented hiring criteria which in its view were objectively justified by business considerations and calculated to favor neither applicants from the laid off Spencer work force nor new applicants. The Respondent also contends that it applied the criteria equally and without discrimination. Among the criteria was a rule prohibiting the employment in any facility of more than one member of an immediate family (anti-nepotism rule). Additional criteria included the evaluation of an applicant's job stability, medical problems affecting packinghouse work, absenteeism including time lost because of accidents, and history of disciplinary warnings during previous periods of employment. Applicants who had been employed at the Spencer facility before its closure in October 1977 were judged on their record during their Spencer Foods' tenure as reflected in their personnel files. New applicants were judged on their most recent employment as represented by them or as revealed in job reference checks.

When the plant reopened on 26 February 1979 approximately 1100 applications had been received of which approximately 250 were from the former unit employees. On that date 69 employees started work. Approximately one-third of them were former unit employees. During the first year of operation under Land O' Lakes' ownership Respondent employed an average of 200 employees to fill the approximately 220 projected positions. There was a high turnover rate—more than 500 individuals were hired during 1979 and 275 were terminated.

I. SUCCESSORSHIP AND THE 8(A)(5) ALLEGATIONS

The threshold test for the inheritance of bargaining obligations developed by the Board and approved by the Supreme Court in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), is whether there is substantial continuity of the business enterprise. The Board's application of this test involves consideration of the totality of the circumstances surrounding the transfer[5] as well as the operations

[5] In finding that the Respondent remained the same employing entity the judge focused primarily on the stock transfer method by which Land

Continued

of the original and the purchasing enterprises. The factors traditionally weighed by the Board include continuity in operation, location, work force, working conditions, supervision, machinery and equipment, methods of production, and product.[6]

Applying these principles to the facts of this case we are convinced that the record compels a conclusion that the resumption of the Spencer Foods operation did not involve the "substantial continuity of the business enterprise" which would support the 8(a)(5) allegation. We first note that the hiatus in operations of the Spencer plant lasted for almost a year and a half. Additionally, Spencer Foods, Inc., as a corporate division of Land O' Lakes, was directed by substantially new top management and plant supervisory personnel. Four of the six Spencer Foods facilities were eliminated. The size of the work force at Spencer was drastically reduced due to a change from a two-shift to a one-shift operation and the elimination of the nonkosher product line. As a result the Respondent no longer supplied certain of its former customers and it added new customers. A series of other changes further militate against a finding of continuity between the original Spencer Foods operation and its reemergence as a new corporate subsidiary of Land O' Lakes. Land O' Lakes directed that efforts be made to secure supplies from its own members. It thereby began to realign the Respondent as part of its large agricultural cooperative. Land O' Lakes made further capital investment in this subsidiary by providing approximately $1,300,000 beyond the initial purchase price for new equipment purchases and other substantive plant improvements. As a result of these changes production steps and job assignments were substantially modified.

In these circumstances, we find that the Respondent as a subsidiary of Land O' Lakes is a new and independent enterprise and is not a successor to Spencer Foods, Inc.[7] Accordingly, we dismiss the 8(a)(5) allegations in the complaint.

II. THE 8(A)(3) VIOLATION

We agree with the Respondent that as a new entity with no successorship obligations under the Act it was free to hire a new work force. However, it was required to do so in a manner not violative of the Act. This it failed to do. We find that the Respondent was aware that all of Spencer's employees were union members and that it designed and implemented its hiring criteria, especially the anti-nepotism rule, in a discriminatory manner so as to disqualify most of those former employees. We also agree with that portion of the judge's rationale supporting his finding that the Respondent was unlawfully motivated by the knowledge that the entire Spencer work force had belonged to the Union.[8]

The judge concluded that the Respondent's anti-nepotism rule was discriminatory. The record shows that approximately one-half of the members of Spencer Foods' preclosure work force were related to one another within the meaning of the Respondent's hiring criterion which prohibited the

O' Lakes acquired Spencer Foods. He applied precedent that holds that under fundamental principles of corporate law the transfer of stock alone does not alter the nature of the employing entity. *Western Boot & Shoe*, 205 NLRB 999 (1973), and *Topinka's Country House*, 235 NLRB 72 (1978). The judge also cited and relied on *Hendricks-Miller Typographic Co.*, 240 NLRB 1082 (1979), which states in dicta at fn. 4 that there is a "difference in genesis" between a stock transfer and a successorship situation because a stock transfer "involves no break or hiatus between two legal entities, but is, rather, the continuing existence of a legal entity, albeit under new ownership." As set forth in detail by the judge and summarized herein the record reveals much more than the mere substitution of one owner for another through a stock transfer within the context of an ongoing enterprise. Further, the purchase arrangement between Spencer Foods and Land O' Lakes resembled in part an assets purchase in that Land O' Lakes did not acquire four unwanted Spencer Foods facilities. Unlike the situation here, the respondent in *TKB* acquired the predecessor's stock without a hiatus, retained the same work force, and made no operational changes. In these circumstances *TKB* is distinguishable.

[6] See *Georgetown Stainless Mfg. Corp.*, 198 NLRB 234 (1972), and *Miami Industrial Trucks*, 221 NLRB 1223 (1975).

[7] See *Cagle's, Inc.*, 218 NLRB 603 (1975), and *Blazer Corp.*, 236 NLRB 103 (1978).

[8] Concerning the 8(a)(3) violation, our dissenting colleague appears only to disagree with us on the question of the Respondent's motivation. Contrary to the judge, she apparently believes that proof of actual motive is a condition precedent to establishing a prima facie violation of Sec. 8(a)(3). This view is inconsistent with well-settled principles that certain conduct carries its own indicia of intent and that as to those actions which are inherently destructive of important employee rights no proof of actual motive need be established. Contrary to our colleague, we believe that the facts found by the judge point to the inescapable conclusion that the Respondent sought to weed out members of Spencer Foods' former work force because of their union membership. We disagree with Member Dennis' conclusion that the General Counsel failed to establish a prima facie case that the Respondent's decision not to "recall" the former Spencer work force was unlawfully motivated. We also disagree with her reliance on *Jim's Big M*, 264 NLRB 1124 (1982).

The employer in *Jim's Big M*, knowing that the former work force was represented by a union and being aware only of rumors of employee theft, declined to hire the former employees with an "apparent disinterest in their *individual* ability or reputation as workers." Here the Respondent had knowledge of more than mere rumors; it had received President Pearson's specific report that poor union-management relations were in part responsible for productivity problems and it acted on this knowledge. Member Dennis downplays the importance of this knowledge of Spencer Foods' union problems, characterizing it as mere "bare fact" insufficient to warrant an inference that antiunion considerations were a motivating factor in the Respondent's hiring decision. Unlike our colleague we attach greater significance to this factor. And it is for this reason that we find *Jim's Big M* distinguishable.

The Respondent did not, as in *Jim's Big M*, reject the former work force out of hand but instead announced its intention to evaluate all applicants individually pursuant to nondiscriminatory criteria. The Respondent however failed to do so through its use of the anti-nepotism rule and by disparately evaluating applicants from the former Spencer work force. In these circumstances, the Respondent's knowledge of the poor labor relations at the Spencer plant coupled with its use of the anti-nepotism rule and its disparate treatment of former employees establish a prima facie case of discrimination. Under *Wright Line* the burden then shifts to the respondent to rebut the presumption, and the Respondent failed to do so here.

employment of more than one member of an immediate family. We agree with the judge that the use of this rule was discriminatory with respect to the former Spencer work force since it was not uniformly applied by the Respondent at its other operations.[9]

While the other hiring criteria appear to be facially nondiscriminatory, we find, in agreement with the judge, that former Spencer employees were subjected to more stringent evaluations under those criteria than were new applicants and that consequently the hiring process favored the new applicants. The judge's finding of an overall pattern of disparate treatment is fully supported by his discussion summarized below of the effects of reference checks made on new applicants and of the evaluations by the Respondent of applicants' medical and work histories.

Land O' Lakes' director of industrial relations testified that each applicant was subject to a reference check on the information supplied in his or her application. The personnel files of applicants from the former Spencer work force were closely examined with respect to the hiring criteria's specific limits for absenteeism, discipline, and lost time accidents. New applicants submitted on a form prepared by the Respondent information on the number and type of previous work accidents but only a general statement about absenteeism. The Respondent did not inquire about disciplinary warnings received during previous employment.

As found by the judge the personnel records of over 200 successful applicants fail to show that previous employers were contacted to verify new applicants' versions of their employment history. A Land O' Lakes' personnel department employee testified that the process by which she made reference checks on new applicants was hectic and rushed. The information she did obtain was more generalized than that which was sought in the application form and, as found by the judge, included "vague, subjective, second hand impressions." Thus the Respondent hired new applicants either without reference checks or based on information not sufficiently detailed to satisfy the requirements of the hiring criteria. On the other hand, members of the former Spencer work force were rejected based on the detailed information contained in these individuals' personnel records.

With respect to applicants' medical histories, many individuals previously employed by Spencer Foods were rejected because of information included in their files. The Respondent did not systematically evaluate the contemporary importance of Spencer employees' old health problems. However, new applicants, even those with a reported history suggesting possible medical disqualification, had an opportunity to take a physical examination in order to determine their current state of health.

In view of the foregoing, we find that the record amply supports the judge's conclusion that the Respondent applied its hiring criteria less rigidly to new employees in support of a discriminatorily motivated decision to inhibit the hiring of former employees.[10] This along with the use of the anti-nepotism rule constitutes a violation of Section 8(a)(3) and (1).

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers International Union, Local 152, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By establishing hiring criteria in order to discriminatorily disqualify employees previously employed by Spencer Foods, Inc. at its Spencer plant and by applying the criteria in a discriminatory manner because of those individuals' membership in, representation by, and activity on behalf of the Union, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

[9] Contrary to our dissenting colleague we are not persuaded that the Respondent has established that its anti-nepotism policy and the exceptions thereto have been applied consistently throughout its corporate system. While the Respondent apparently has a *rule* concerning nepotism, the lack of uniform application of the rule negates a finding of a corporatewide *policy*. Thus, the Respondent admittedly did not apply the rule in situations where there was a small labor pool. However, there was apparently no corporatewide method for determining how this "exception" was to be applied. In this regard we note the testimony of the Respondent's corporate staffing manager Terrance Koves that while he was previously the human resources director for Land O' Lakes' poultry division stationed at Albert Lea, Minnesota, he was not aware of any specific management decision to apply the exception at the Albert Lea facility. Relatives have been and continue to be hired there. The population of Albert Lea itself is approximately twice that of Spencer. Additionally, the Albert Lea facility has traditionally drawn its work force from a two county area. The Respondent's corporate director of industrial relations, William Huron, testified that the exception was applied at the newly acquired Schuyler facility because the population of Schuyler itself was "mighty small."

Schuyler itself has a population of only about 4000. However, the record additionally reveals that the Schuyler facility has traditionally drawn its work force from surrounding communities with a total population of approximately 40,000. We note that the Respondent has continued to hire relatives after it acquired the Schuyler facility.

In these circumstances, the Respondent's defense that it merely applied a uniform policy at Spencer is not supported by substantial probative record evidence. In the absence of a consistent past practice, we find *Inland Container Corp.*, 267 NLRB 1187 (1983), is inapposite.

[10] Contrary to our dissenting colleague's claim, we do not find fault with an employer's use of former employees' personnel files. Rather, we find that the Respondent subjected former employee applicants to a greater degree of scrutiny than new applicants. It is this disparate treatment which we find violative of Sec. 8(a)(3).

4. By its plant manager and agent Dennis Heineman on 8 March 1979, and by its agent William Huron in February 1979, the Respondent told two job applicants that they would not be employed in the future when work was available to them and when they were willing to work if they presently refused to cross the Union's lawful picket line. The Respondent thereby engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

5. The above-mentioned unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not engaged in any violations of Section 8(a)(5) nor, other than as found above, in violations of Section 8(a)(1) of the Act.

AMENDED REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, we shall order that the Respondent cease and desist therefrom and take certain affirmative action to effectuate fully the purposes of the Act. In light of our finding that the Respondent has not violated Section 8(a)(5) of the Act we shall modify the recommended remedy ordered by the judge for the 8(a)(3) violation.

As stated above a new employer is entitled to select its own work force but in exercising this freedom it may neither use discriminatory criteria for hiring nor implement neutral criteria in a discriminatory manner. Our 8(a)(3) finding is that the Respondent has so discriminated. Therefore, we shall order the Respondent to offer all individuals who would have been hired in and after January 1979 employment in the positions for which they would have been hired but for the Respondent's unlawful discrimination or, if those positions no longer exist, to substantially equivalent positions, dismissing, if necessary, any and all persons hired to fill such positions. We shall require the Respondent in its consideration of all applicants to use nondiscriminatory criteria and apply them equally to all potential employees. In particular we shall require the Respondent to refrain from applying the anti-nepotism rule and to not disqualify any job applicant because of his or her close family relationship to a current member of the work force. The Respondent shall also place on a preferential hiring list all remaining discriminatees who, under nondiscriminatory criteria, would have been hired but for the lack of available jobs. We shall also order the Respondent to make whole for any losses they may have suffered all individuals it would have hired but for its unlawful discrimination against them. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

ORDER

The National Labor Relations Board orders that the Respondent, Spencer Foods, Inc., Spencer, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Establishing hiring criteria in order to discriminatorily disqualify employees previously employed by Spencer Foods, Inc. at its Spencer plant and applying the criteria in a discriminatory manner because of those individuals' membership in, representation by, and activities on behalf of the Union.

(b) Telling job applicants that they would not be employed in the future when work was available to them and they were willing to work if they presently refused to cross the Union's lawful picket line.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer to all individuals who would have been hired in and after January 1979 employment in the positions for which they would have been hired but for the Respondent's unlawful discrimination or, if those positions no longer exist, to substantially equivalent positions dismissing, if necessary, any and all persons hired to fill such positions; and place on a preferential hiring list all remaining individuals who would have been hired but for the lack of available jobs.

(b) Make whole in the manner set forth in the section above entitled "Amended Remedy" those individuals the Respondent would have hired but for its unlawful discrimination for any losses they may have suffered by reason of the Respondent's failure to hire them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its plant in Spencer, Iowa, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER ZIMMERMAN, concurring in part.

I agree with Member Hunter that the Respondent unlawfully discriminated against employees because of their union membership in establishing and implementing its hiring criteria, and that the Respondent's motivation was to eliminate the Union as the employees' collective-bargaining representative.

Contrary to Member Hunter and Member Dennis, I would find, for the reasons set forth by the judge, that the Respondent continued as the same employing entity, inasmuch as "the same work continued for the same corporate entity at the same place, with the same or substantially similar procedures, processes and machinery, serving the same customers or same type of customers with much the same sources of supply." Accordingly, I would adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition of the Union in December 1978, by refusing to bargain thereafter concerning the recall of laid-off employees, by unilaterally changing wages and benefits, and by unilaterally establishing criteria for recall.

MEMBER DENNIS, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) of the Act by telling two job applicants that they would not be considered for future employment if they refused to cross a lawful picket line. I also agree with Member Hunter's conclusion that the Respondent is not the same employer that previously operated the Spencer plant, and that *TKB International*, 240 NLRB 1082 (1979), is distinguishable. This case involves much more than a simple change in ownership resulting from a stock transfer. The purchase, effected through the technical device of a stock transfer, more closely resembled an assets purchase because the Respondent in reality bought only two of the several plants Spencer Foods, Inc. (SF) owned. The new owners did not simply assume the former enterprise's operations. To the contrary, the Respondent made substantial changes in almost all levels of operations and management.

I also agree with Member Hunter's conclusion that the Respondent is not a successor employer obligated to bargain with the Union. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). The Respondent in effect purchased only a portion of SF; reopened the closed Spencer, Iowa plant after a year and a half hiatus; implemented substantial changes in management and supervision; reduced the work force to half its previous size; changed the product and production methods; and effected significant capital improvements in the physical plant. More importantly in my view, the Respondent did not hire a majority of its employees from the Spencer plant's former work force, and did not, as I discuss below, fail to do so because of unlawful discrimination. Id. at 280 fn. 5, 286. See also *Howard Johnson Co. v. Hotel & Restaurant Employees*, 417 U.S. 249, 262 fn. 8 (1974). Accordingly, I find that the Respondent is not a successor, and I join Member Hunter in dismissing the alleged violations of Section 8(a)(5) and (1) of the Act.

I do not, however, agree with my colleagues that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminating against the former employees because of their union activity. I find the evidence insufficient to support this conclusion.

I. FACTS

During the discussions leading to the Spencer plant purchase, Gerald Pearson, SF's president, wrote to Ralph Hofstad, president of Land O' Lakes (LOL), informing him of the multitude of problems causing SF's "erratic performance" and "disappointing results." Pearson stated that desired savings at the plant did not materialize for a number of reasons, including ineffective recruiting which resulted in "a poor addition to the work force." Pearson frankly acknowledged poor labor relations—a "Union Versus Company attitude"—and said that the lack of strong plant management compounded the situation. Summarizing the problems, Pearson attributed the poor operations to the older facility, an inconsistent management, and "a high-cost unproductive labor force."

After LOL purchased SF in the fall of 1978, Union President Lowell Lauritsen wrote on two

[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

occasions to SF and LOL. He identified the Union as the bargaining agent for the employees of the closed Spencer facility, requested bargaining about the terms of employment, and stated that the employees were available to return to work. Vice President of Operations William Eastwood, one of the two SF officials LOL hired for Spencer Foods, a Division of Land O'Lakes (SF/LOL), responded to Lauritsen. He confirmed plans to reopen the plant and stated that applications for employment would be taken from all interested individuals, including former employees.

LOL officials directed LOL Industrial Relations Director William Huron to hire the best work force possible, but did not give any specific instructions concerning the former employees. In December 1978, Huron drew up hiring criteria, attempting to set a standard for a quality work force.[1] He examined plant records on workmen's compensation costs, absenteeism, and "things of that nature." Huron did not, however, review former employees' personnel records.

Huron selected criteria designed to cull out applicants who were unstable or unsuited to meatpacking work, unwilling to accept the wages LOL planned to pay, or had excessive absences, warnings, or accidents. The criteria also included an anti-nepotism rule which embodied the essentials of a policy LOL formally adopted in 1973.[2]

The first step in the hiring process was the initial screening and interview by Iowa Job Services (IJS).[3] If the IJS interviewer concluded that an individual was worthy of further consideration, he or she referred the application for review by LOL officials. It is not clear how many individuals IJS screened out, but LOL's reviewers received from 60 to 100 applications a day and ultimately examined over 2000 applications.[4] If the applicant was a former employee, the LOL reviewers looked at past work records to decide whether to consider the application further. The reviewers also consulted SF/LOL employees who had worked for SF, seeking information about new applicants and former employees. Leo Lang, a former SF supervisor SF/LOL hired as plant superintendent, was a principal source of information. The record shows that Lang reported former employees' misconduct, such as failure to wear a hardhat in a hardhat area, smoking in a prohibited area, leaving the plant without authorization, and "horseplay" on the production floor that he viewed as creating safety hazards. If, after evaluating the application and any additional information, the reviewers felt an applicant was worthy of further consideration, they

[1] Those criteria are as follows.

1. Necessary job skills.
   A. The ability to lift sixty (60) lbs. or more on a regular basis.
   B. Above average manual dexterity as evidenced by past job history.
2. Interest in packinghouse work.
   A. Describe working conditions and observe reaction. Determine willingness to work in beef processing industry.
3. Obvious wage expectation versus wage schedule problems.
4. Work history.
   A. Job stability as reflected in past employment. For general labor in the plant, applicants should have held no more than three (3) jobs in the last five (5) years. Exclude layoffs due to plant closings.
   B. Screen out individuals discharged from any previous employment.
5. Obvious medical problems/physical restrictions:
   A. Tendonitis.
   B. Lower back syndrome.
   C. Allergies.
   E. Dermatitis in the form of rashes when near blood, animal fat, chemicals, oils, detergents, etc.
   F. Heart problems/high bood pressure.
   G. Loss of limb(s)/fingers.
   H. Respiratory problems/T.B./emphysema.
6. No more than one (1) member of an immediate family may work for Spencer Foods, Inc. Immediate family is defined as: spouse, child, parent, grandparent, brother, sister, in-laws (mother, father, brother, sister).
7. No more than an average of four (4) absences per year over the last two (2) years. Periods of hospitalization or major medical conditions to be separately evaluated.
8. No disciplinary warnings of any kind in the last eighteen (18) months. Past Spencer Foods, Inc. employees: May 1976–October 1977.
9. No more than two (2) lost time accidents in the last three (3) years. Past Spencer Foods, Inc. employees: November 1974–October 1977.

[2] That policy is as follows.

Purpose

To avoid potential problems, a policy for the employment of relatives is needed.

Basic Policy

1. Permanent Employees.
   a. Close relatives of either a present employee or a present member of the Board of Directors will not be hired. Close relatives include parent, spouse, child, brother, sister, or in-laws (mother, father, brother, sister).
   b. If two employees working for the company are subsequently married, they will be allowed to continue their employment. However, they will be transferred to unrelated departments.
   c. In small communities it may be necessary to employ close relatives due to the manpower supply. The geographical area and size of the community will be an essential part of the evaluation. In such instances, a supervisor cannot supervise a close relative. (See exceptions, part 3.)
2. Temporary, Part-Time, or Summer Employees.
   Whenever feasible, the company will employ close relatives who are *students* for temporary, part-time, or summer employment. They will be screened and selected upon their qualifications the same as other applicants. In the event a close relative is hired, he will not be allowed to work in the same department, division, or location, or under the direct supervision of a relative.
3. Exceptions
   If exceptions become necessary, the individual who is responsible for hiring must confer and receive final approval from the Division Manager. We encourage conference with the Employment Manager of Corporate Personnel if the need arises.
   Under no circumstances will the manager of a location, division, or department be allowed to hire his spouse, child, parent, brother, sister, or in-laws (mother, father, brother, sister).

[3] IJS interviewers used the LOL hiring criteria and had been directed not to screen out applicants for "ridiculous reasons."

[4] The large number of applicants confirmed statements by IJS that there were sufficient individuals in the open job market to fill the projected 200–220 positions.

would arrange an interview with one of LOL's seven interviewers.

References listed on the application were checked either before or after an interview. Dawn Meyer Hansen, the individual LOL assigned to check references, was occasionally assisted by other employees. In the hectic and rushed atmosphere the heavy applicant load created, Hansen used a reference check form[5] and made telephone inquiries of former employers. In cases where an applicant was recommended by a supervisor or employee of SF/LOL, she made no effort to contact previous employers. She did not document each reference check she performed, nor did she systematically follow the form in requesting information on applicants.

One applicant, William Smith, wrote on his application that he had "worked [apparently at SF] before their labor dispute," but was off when the last dispute occurred. The files of 11 other applicants who were hired contained similar notations, apparently written by LOL's interviewers.[6] There is no evidence of any interrogation concerning union sympathies, and it is not clear when these notations were made. When SF/LOL opened the plant, the Union picketed as the hiring process continued, and some remarks could have been prompted by the pickets' presence.

On 26 February 1976, opening day, SF/LOL had 69 employees, 22 or 23 (33 percent) of whom were former employees. As of that date, SF/LOL had received over 1100 applications: 850 from new applicants, and 250 from former employees. SF/LOL hired approximately 8.8 percent of the former employees who applied, but hired only 5.5 percent of the new applicants. SF/LOL also hired approximately 20 to 25 employees to assist in plant construction. Eight to 10, or 32–40 percent, of these employees had worked for SF.

II. THE JUDGE'S FINDINGS

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by establishing conditions for recall to disqualify most employees laid off at the Spencer plant, and by refusing to recall most of those laid-off employees because of their support for the Union to eliminate the Union as the employees' bargaining representative. The judge determined that the inherent and foreseeable effect of the Respondent's conduct was its tendency to give employees, applicants, and the community the impression that the employees were not recalled because of their union activity. He found, under *Great Dane*,[7] that the Respondent had "created a situation whereby the failure to recall employees according to past practice ha[d] necessarily become inherently destructive of employees' rights under the Act" and that the Respondent, therefore, had the burden of proving that its motive was economic. The judge also concluded that, even if *Wright Line*[8] applied and proof of actual motive was required, the General Counsel adduced sufficient evidence to support an inference that the employees' union activity was at least "a motivating, if not [the] sole, factor" in the Respondent's decision to hire a new work force under new employment criteria. Under a *Wright Line* analysis, the Respondent had to establish that "it would have decided to hire new employees under new criteria . . . in the absence of the employees' [union activity]."

The judge concluded that the Respondent did not meet its burden concerning the failure to recall the former employees. According to the judge, the Respondent rejected the former employees' offer to return to work before it had definitive information that the former work force was deficient. Pearson's 1977 letter to LOL, which identified the major problems at the plant as being "an older facility, inconsistent management, and a high-cost unproductive labor force," was not an adequate basis for the decision because it failed to condemn the former employees' workmanship or effort.[9]

[5] The form reads as follows.
Name of applicant
Name of Person Contacted
Company
Employment dates to
Job duties
How would you rate this person's job skills?
Poor Fair Average Good
a) Willing to do required task?
b) Conscientious about completing tasks?
c) Attitude? Problems
How would you rate this person's attendance record?
Poor Fair Average Good
a) Were there good reasons for absences
b) Tardiness?
How did this person get along with fellow workers?
With his Supervisor?
Did this person have any work related accidents while in your employ?
How many What type
Do you think this person would be a good employee for Spencer Foods?
(If no longer employed) Would you rehire this person?
Signed Date

[6] For example, former employee Andis was quoted as stating that there were "too many freeloaders," and that the "Union shouldn't protect them." Applicant Bowers remarked that her cousin Lauritsen "messed a lot of people up." Anthony Prodaga's job rating form states, "No interest in union activity." Former employee Larry Christenson declared that the Union "got what it deserved" when SF closed the Spencer plant.

[7] *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

[8] *Wright Line*, 251 NLRB 1083 (1980).

[9] The judge found it significant that the letter discussed the history of labor-management conflict and the "Union Versus Company" attitude, and he concluded that the "prescription for success" included a "'free-standing'" employee complement and a company which need not therefore deal with a union.

The judge also concluded that the Respondent violated Section 8(a)(3) and (1) by implementing new employment criteria to screen out former employees and by applying those standards less rigidly to new employees in order to avoid bargaining. The judge found that the anti-nepotism policy was not universally applied, that it "adversely affect[ed] the hiring prospects of half the former work force," and that Huron must have considered its impact on the former work force.

Similarly, the judge concluded that the Respondent's use of former employees' personnel files to screen out applicants was discriminatory because new employees did not labor under this handicap and often had an opportunity to explain the extent of any problem or disability. The same was true, the judge found, of reference checks. Former employees were judged in light of the information disclosed in the personnel files, as supplemented by supervisors' opinions, which the judge found were "generalized, impressionistic, [and] conclusionary." New applicants, in "contrast," were subjected to reference checks that sought "generalized conclusions" on matters such as attendance and asked nothing about disciplinary warnings.

I disagree with the judge's use of the *Great Dane* standard, his evaluation of the evidence under *Wright Line*, and his conclusions.

III. ANALYSIS

The factual foundation of the judge's *Great Dane* conclusion was his finding that the Respondent was the same employer as previously existed at the Spencer plant. We have reversed this finding. What remains is the judge's determination that, because the Respondent failed to recall the former employees and chose to recruit employees from among all applicants, the Respondent violated the Act. This analysis is at odds with well-settled law. The Respondent, as a new employer, could lawfully decide to hire new employees or to retain any or all of the former employees.[10] The only relevant restriction is that such a decision could not be based on union-related considerations.[11]

The critical issue is the Respondent's motive in making the various challenged hiring decisions. The appropriate standard is that set forth in *Wright Line*, 251 NLRB 1083 (1980). Under this standard, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. Id. at 1089.

Concerning the Respondent's decision not to recall the former work force, I find that the General Counsel did not establish a prima facie case. During negotiations leading to the purchase of the Spencer plant, the Respondent was informed of the multiplicity of problems causing the plant's poor operations. The basic problems SF identified were poor management, the older facility, and an unproductive labor force. In seeking to revitalize the closed plant, the Respondent effected changes in management, renovated the production facility, and sought to upgrade the quality of the work force. Nothing, other than the bare fact that the Respondent was aware of SF's labor-management problems,[12] warrants the inference that antiunion considerations, rather than a concern about the overall quality of the unsuccessful business's work force, motivated the Respondent's decision to hire from among all applicants.

As the Board's decision in *Jim's Big M*, 264 NLRB 1124 (1982), demonstrates, nothing in the Act precludes an employer from trying to avoid the personnel mistakes of a failed enterprise. In *Jim's Big M* the judge found a prima facie case that the respondent had violated Section 8(a)(3) and (1) of the Act by failing to rehire the former employer's employees. The judge's finding rested on the following factors: (1) the new employer's knowledge that a union represented the employees; (2) his failure to inquire into the former employees' skills despite the fact that the new operations were to be essentially the same; and (3) his interviewing all the applicants he did not already know, *except* the former employees, despite the fact that those former employees had all filed individual applications. The Board held that "in the circumstances herein, absent a showing of union animus or other unlawful reason for the alleged discriminatory conduct, the evidence relied on by the [judge] in finding a *prima facie case was insufficient to raise an inference that the employees' status as union members, rather than, for example, their status as former employees of an unsuccessful business, was in any way related to Respondent's decision not to hire them.*" Id. at fn. 2 (emphasis added).

[10] *Burns*, above, 406 U.S. at 280 fn. 5. See also *Howard Johnson*, above, 417 U.S. at 262; *Inland Container Corp.*, 267 NLRB 1187 (1983); *Jim's Big M*, 264 NLRB 1124 (1982).

[11] *Burns*, above, 406 U.S. at 280 fn. 5. Of course the *Great Dane* standard can and should be applied in appropriate cases. For the reasons set forth herein, however, I strongly disagree with my colleagues that this is such a case.

[12] This fact apparently formed the basis for the judge's conclusion that the "prescription for success" included a "'free-standing'" employee complement and a company which need not deal with the Union. For the reasons set forth herein, however, I find the judge's conclusion unwarranted.

The facts in *Jim's Big M* more strongly indicated the presence of antiunion motive than do the facts here. In the instant case, the Respondent informed the Union that it would accept the applications of all employees, and then evaluated, interviewed, and hired many of those former employees, despite knowledge of specific problems with the former work force as a whole. The employer in *Jim's Big M* was aware only of "rumors" of employee theft and declined even to interview—much less hire—the former employees who applied, despite the fact that every other applicant, save those the employer personally knew was at least interviewed. Of the two, *Jim's Big M* more strongly compels finding a violation. If the facts of that case were insufficient to warrant the inference of antiunion motive, the same is true here.

Nor can I agree with the judge's conclusion that the Respondent's hiring criteria and practices violated Section 8(a)(3) and (1) of the Act. These conclusions ultimately rest on two bases: (1) that the anti-nepotism hiring criterion was not a uniformly applied rule that the Respondent could lawfully implement at the Spencer plant; and (2) that the Respondent could not properly make hiring decisions based on the information in the former employees' personnel files. I find insufficient evidence to support these two determinations.

First, the Respondent's anti-nepotism rule, included in the hiring criteria,[13] was formally implemented in 1973, and has been applied to applicants throughout the LOL system since that time, except—as the rule states—where the size of the community and the employee pool require relaxation of the ban, or where "close relatives who are students" are employed for temporary, part-time, or summer employment.[14] With one possible exception, all the relatives hired by SF/LOL fit within the rule's stated guidelines. Curtis McClintic, the possible exception, was related to an office worker and was hired as a temporary employee. It is not clear that he was also a student. I find the existence of this one variation to be insufficient to warrant the inference that the Respondent's use of the rule was motivated by unlawful considerations. Similarly, the fact that the rule was not enforced to disrupt the employee complement already in place at two newly acquired unionized plants is insufficient to warrant an inference of discrimination. The reason for the exception, avoiding disruption in ongoing operations, did not exist at the closed Spencer facility. Therefore, the Respondent's decision to apply the anti-nepotism rule at the Spencer plant, a decision consistent with its past practice, cannot be used as an indication of impermissible motive.

This conclusion is supported by *Inland Container Corp.*, 267 NLRB 1187 (1983), in which the Board found that the employer was entitled to rely on its past practice and preference in refusing to hire *any* of the former employer's employees simply because they were experienced. The employer lawfully applied its policy of hiring a totally inexperienced production complement to avoid unspecified "bad habits," even though the former employer had been a successful enterprise, the former employees were highly qualified to perform the new work, there was no evidence that the former employees could not have been successfully retrained the "Inland way," and the employer's operations had not at the time of the hearing reached the previous production level.[15] Past practice validates the Respondent's action in the instant case no less than it did for the employer in *Inland.*

Second, with respect to the Respondent's use of former employees' personnel files in the hiring process and the sanction given that practice by the hiring criteria, I again cannot find sufficient evidence of unlawful motivation. No party challenges the general accuracy of the information contained in the files or argues that an employer cannot reasonably rely on such information in making employment decisions.[16] The basic attack is on the

[13] The other criteria the Respondent established were clearly directed toward objectively evaluating an applicant's potential and desire to work for the new enterprise; ability, interest, job stability, wage expectations, medical problems, absenteeism, disciplinary concerns, and accident proneness were all considered.

[14] The record shows that exceptions were made on a plant-by-plant basis by the officials in charge of hiring. The Respondent's corporate staffing manager, Terrance Koves, testified that the rule was not applied at the Respondent's Albert Lea plant because the Respondent had difficulty securing a sufficient number of employees. Similarly, William Huron, LOL's industrial relations director, explained that the rule was not applied at the Respondent's Schuyler plant because Schuyler fit within the small community exception. The population figures adduced by the General Counsel, and on which my colleagues rely, are inconclusive because the availability of qualified applicants is determined by many factors other than population, including the number of employers competing in the same labor market for the same employees. The Respondent's initial decision to apply the anti-nepotism rule at the Spencer plant is amply supported by IJS assurances, later borne out by the large number of applicants, that there were sufficient individuals in the job market to fill the projected positions. Accordingly, contrary to my colleagues, I cannot find that the General Counsel met his burden of proving that the Respondent discriminatorily applied its anti-nepotism policy.

[15] The Board also found in *Inland* that the employer's (1) hiring some of the predecessor's clerical and supervisory personnel, (2) hiring two experienced employees at another plant, and (3) refusing to hire a clearly qualified mechanic for nonproduction work in a job the employer had great difficulty filling, were insufficient to show that the employer's rationale was pretextual. Similarly, the employer's statement that it intended to start the plant and operate it on a nonunion basis, unless and until the union could win an election, was simply a "candid explanation of [the employer's] lawful intentions."

[16] To find that the Respondent's use of the former employees' files indicates an antiunion purpose requires a subsidiary finding that the Re-

Continued

Respondent's alleged failure to give the benefit of the doubt to former employees while extending it to new applicants. It is not entirely true, however, that the Respondent failed to give former employees the benefit of the doubt. The Respondent hired 20 former employees despite their not meeting the terms of the hiring criteria.[17] In addition, as the judge himself finds, the Respondent did not always simply accept the information in the files; to the contrary, the Respondent asked supervisors or other employees for their opinions of former employees. These inquiries were analogous to the Respondent's reference checks of new applicants and showed a willingness to evaluate former employees in light of whatever favorable or unfavorable information was readily available.

The only factor that could arguably warrant an adverse inference is that the Respondent thought some applicants' union sentiments were significant enough to note during the interviews. Considering the record as a whole, however, I cannot conclude that this fact alone warrants the inference that the Respondent's entire hiring process was tainted by unlawful considerations. Only 11 such notations were made, and there is no evidence that the Respondent interrogated applicants or rejected any who expressed "pro-union" sympathies.[18]

In sum, I do not find sufficient evidence on the record as a whole to warrant the conclusion that the Respondent's hiring decisions or practices at the Spencer plant were based on impermissible considerations. Accordingly, I would dismiss that portion of the complaint.

spondent could not lawfully use or rely on the information they contained. I cannot agree with that conclusion; to the contrary, I find it unreasonable to expect an employer in the Respondent's position, sorting through 60 to 100 applicants a day, to ignore such information.

[17] Marlene Weise, Richard Roth, Dale Nelson, Richard Hott, Jerry Holst, Shawn Drenth, Roger Christenson, Peter Brustares, Larry Christenson, Dale Barker, Steve Wallace, Raymond Heller, James Heller, Dorrinda Goodale, Wayne Clark, Alvin Andis, Valerie Shatto, Jose Osegura, Salvador Lopez, and Larry Lang.

[18] In considering the Respondent's motivation, it is also noteworthy that the Respondent retained the former employees, recognized the union representatives, and honored the collective-bargaining agreements at its Schuyler, Nebraska, and Oakland, Iowa, plants. This conduct is consistent with, if not indicative of, a lack of union animus. See *Inland Container Corp.*, above, 267 NLRB 1187, 1190 (amicable relations with unions elsewhere indicates lack of union animus).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT establish hiring criteria designed to discriminatorily disqualify employees previously employed by Spencer Foods, Inc. at its Spencer plant and WE WILL NOT apply our hiring criteria in a discriminatory manner because of those individuals' membership in, representation by, and activities on behalf of the United Food and Commercial Workers International Union, Local 152, AFL-CIO.

WE WILL NOT tell job applicants that they will not be hired in the future if they refuse to cross a lawful union picket line.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer individuals who would have been hired to available positions in and after January 1979 employment in the positions for which they would have been hired but for our unlawful discrimination or, if such jobs no longer exist, to substantially equivalent positions, dismissing, if necessary, any and all persons hired to fill such position. WE WILL place on a preferential hiring list all remaining individuals who would have been hired but for the lack of available jobs. WE WILL make whole with interest all individuals we would have hired but for our unlawful discrimination for any loss they may have suffered by reason of our failure to hire them.

SPENCER FOODS, INC.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: Pursuant to an unfair labor practice charge filed by Amalgamated Meat Cutters and Butcher Workmen of North America, Local 152, AFL-CIO, herein referred by its correct name to reflect its recent merger as United Food and Commercial Workers International Union, Local 152, AFL-CIO, herein called the Union, against Spencer Foods, Inc., herein called Respondent, on May 14, 1979, and a complaint issued by the Regional Director for Region 18 on October 4, 1979, and an answer timely filed by Respondent, a hearing was held before me in

Spencer, Iowa, on 20 days spaced intermittently throughout the spring, fall, and winter of 1980, ending on December 17, 1980. Briefs were filed by all parties on or shortly before the extended deadline of April 16, 1981. The issues litigated were whether Respondent as a continuing corporate business or alternatively as a successor employer violated Section 8(a)(1), (3), and (5) of the Act by the following conduct.

(1) In and after December 1978, interfering with, restraining and coercing employees in the exercise of their rights under the Act by interrogation of union activities, threats of refusal of employment because of union activity, and statements that Respondent would not permit employees to be represented at its Spencer, Iowa plant which had been reopened after a lengthy closure, in violation of Section 8(a)(1) of the Act.

(2) In or about December 1978 and January 1979, establishing conditions and criteria for the eligibility for recall of employees in order to disqualify most employees laid off at its Spencer, Iowa plant, and refusing and failing to recall most of those laid off employees because of their membership in, representation by, and activities in support of the Union, and in order to eliminate the Union as the employees' incumbent collective-bargaining representative in violation of Section 8(a)(3) and (1) of the Act.

(3) In December 1978 following a decision to reopen and resume operations at its Spencer, Iowa plant, withdrawing recognition of and refusing to bargain with the Union as the lawfully designated collective-bargaining agent of employees at that plant; and unilaterally establishing conditions and criteria for the recall of its laid-off employees which resulted in the disqualification of most of those employees; and subsequent to the reopening of its Spencer, Iowa plant unilaterally changing wages, benefits and other terms and conditions of employment of employees at the Spencer, Iowa plant in violation of Section 8(a)(5) and (1) of the Act.

On the entire record in this case, including my observation of the witnesses and their demeanor and in consideration of briefs, I make the following[1]

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all times material herein, Respondent, a Delaware corporation, with an office and place of business in Spencer, Iowa, called Respondent's Spencer plant, has been engaged in the slaughtering and processing and nonretail sale and distribution of beef and related products. During the calendar year ending December 31, 1978, which period is representative of its operations during all times material herein, Respondent, in the course and conduct of its business operations, sold and shipped from its Spencer plant products, goods, and materials valued in excess of $50,000 directly to points outside the State of Iowa. During the calendar year ending December 31, 1978, which period is representative of its operations during all times material herein, Respondent, in the course and conduct of its business operations, purchased and received at its Spencer plant products, goods, and materials valued in excess of $50,000 directly from points outside the State of Iowa.

It is admitted, and I find, that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

It is admitted, and I find, that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

A. *Events Leading to and Including Plant Closure—Reopening—Withdrawal of Recognition—Changes in Operation*

Spencer Foods, Inc. (herein S.F.) commenced its corporate existence in 1952 as a beef packing enterprise. It maintained its headquarters and a slaughtering and fabrication plant thereafter in Spencer, Iowa. By 1977 S.F. also operated five other plants, i.e., a slaughter and fabrication plant at Schuyler, Nebraska, which had been constructed in 1967; a fabrication plant in Hartley, Iowa; two tanneries in Wisconsin and Massachusetts; and a processed meats plant in Miami, Florida.

The Union had represented a unit of employees at the Spencer plant since its inception and had maintained a collective-bargaining relationship and a series of collective-bargaining agreements with S.F. until the expiration of the most recent agreement on October 30, 1977, which coincided with the closure of the Spencer plant. In October 1977, there were employed at the Spencer plant approximately 420 unit employees, all members of the Union.[2]

S.F. and the Union until 1971 engaged in a pattern of bargaining which was determined by such major packers as Armour, Swift, and Wilson. In 1971 S.F. sought to break away from this pattern in order to counter a trend to lower marginal profits. An 8-month strike ensued. This was the first strike it had experienced. S.F. goals in bargaining that year were only partially achieved. In 1974 another 3-month strike resulted before a contract was reached. By the fall of 1977 S.F. entered negotiations with an assertion to the Union that its operations at Spencer had reached the point of negative profits, and it requested a 1-year wage and benefits freeze. That proposal as well as a modified proposal for economic relief were both rejected by the Union pursuant to a vote of its members.[3] Thereafter, the Spencer plant was closed. Ex-

[1] The parties' posthearing agreement to amend 70, 71, 73 is hereby approved. The amendments are reflected on the attached Appendix B. [Omitted from publication.]

[2] The unit consists of:
All employees employed by Respondent at its Spencer, Iowa facility; excluding office and clerical employees, General Manager, Superintendent, Foremen, Livestock Buyers, Livestock Buyer Trainees, Salesmen, Chief Engineer, Electronic Scale Maintenance Man, guards and supervisors as defined in the Act.

[3] The Union had offered to work without a contract pending negotiations. That offer was rejected by S.F.

ecutive Vice President William Eastwood testified, "We did not feel that we could commit the economic resources to continue with the uncertainty [sic]." S.F. and the Union bargained about the effects of the closure. An unfair labor practice charge was filed by the Union concerning the closure. A dismissal of the charge by the Regional Director was sustained by the General Counsel. S.F. thereafter commenced efforts to sell the Spencer plant, and to dispose of the tanneries and the Miami and Hartley plants which it had determined were also unprofitable.

Prior to the employees' rejection of S.F.'s bargaining proposals, S.F. had communicated with the employees by letter dated October 25, 1977, wherein the employer's bargaining proposals were explained and the employees were told:

> For the above reasons and especially due to our cattle procurement program, we must know by Thursday whether to plan for next week or to begin to wind down operations. We have offered you as members of the Union body a one-year contract. *If you do not vote on this proposal* or if you should reject the proposal, *there will be no further work after this week.* Your lack of work will be due to a "labor dispute," and our lawyer has informed us that YOU WILL NOT BE ENTITLED TO UNEMPLOYMENT COMPENSATION.

On October 28, the last cattle were slaughtered and on Saturday, October 27, the last cattle loaded out. The following notice to employees was published by S.F:

> NOTICE
>
> Per Mr. Pearson's letter, our final offer has been presented to your Union Committee. Since we have not received an answer on this final offer, and we have suspended cattle buying at the Spencer Plant we cannot operate on Monday, October 31, 1977. If your vote for a *One-year Contract* is Yes prior to October 31, 1977, we will return to work as soon as possible.
>
> Mike Sanem
> Plant Manager

On Monday, October 31, the plant doors were locked and the following notice was distributed to employees who appeared for work at the plant gate.

> TO ALL EMPLOYEES
>
> No notice has been given to the Company, but unofficial reports are that a statement to KICD was that you have voted 396 to 1 to reject the Company's offer. As stated in my meeting and letter to you, we are closing the plant and will place it up for sale. After more than twenty-five years in Spencer, I deeply regret having to take this action.
>
> /s/ Gerald L. Pearson
> Chairman

Shortly after the Spencer plant closure, S.F. contacted various local groups including the Iowa Development Commission and the Sioux County Cattle Feeders Association in an effort to sell the Spencer plant. In late 1977, prior to closure, contact had been made with Land of Lakes, Inc. (hereinafter LOL). At that time LOL was engaged in a process of investigating the prospective purchase of packing plants in order to gain entrance into the red meat business. LOL group Vice President Ronald Dudley was charged with the responsibility of searching out desirable operations which could be acquired by LOL. LOL is a farmers cooperative doing a multibillion dollar business as an agribusiness and is owned by farmer shareholders. It differs from a normal corporation in that its only shareholders are farmers who purchase from it for their own benefit. In essence, it is a marketing and supply corporation which supplies petroleum, seed, and feed to its members and which markets dairy and poultry products.

Dudley testified that in the fall of 1977 LOL became aware of S.F.'s possible interest in selling its Spencer plant. A meeting was thereafter arranged between representatives of LOL and S.F. in Lincoln, Nebraska, at which information was exchanged. Dudley testified that he sought a vast amount of information concerning the worthiness of an acquisition, i.e., "financial performance, ability to sustain itself, any problems that it might have had." Dudley conceded his awareness of S.F.'s labor problems. According to Dudley, LOL decided to pursue negotiations with S.F., which he testified commenced prior to the Spencer plant closure, on October 5, 1977. At that time it was LOL's desire to engage in an assets purchase, and it was S.F.'s desire to sell all but the successful Schuyler plant. As negotiations proceeded, LOL desired to purchase only the Spencer plant and the Schuyler plant.

By letter dated November 15, 1977, President, Chairman, and Chief Executive Officer Gerald L. Pearson communicated with LOL President Ralph Hofstad. That letter commenced as follows:

> In your consideration of the possible acquisition of Spencer Foods, Inc., I am sure that the erratic performance of our Company and the disappointing results of the last twelve months raise many questions as to the future profitability of the Company. In this letter, I will attempt to summarize the recent history of our Company and the prospects for the future.

Pearson described the "dramatic" changes that had transpired in the beef industry, including the impact of high labor costs. He predicted: "In the long run, the low cost producers [largely synonymous with low wage rates and efficient facilities] will prevail in the beef slaughter business." He cited a quotation from the chairman of a major packer to the effect that their 1976 labor contract "sounded the death knell" for their participation in the beef slaughter business.

Pearson described in some detail the recent nonperformance of S.F. He concluded his description of those problems with the following:

> The 1976 expansion of the Spencer plant was done as part of a program to lower unit costs and increase by-product recovery. For a number of reasons, these cost savings did not materialize. The extremely low unemployment rate in the Spencer area combined with a lack of effective personnel recruiting resulted in a poor addition to the work force. The already poor labor relations at the Spencer plant deteriorated further. The lack of strong plant management compounded the situation, reinforcing the Union Versus Company attitude among the work force. These factors coupled with a substantial wage increase, high absenteeism, inordinate workmen's compensation claims, and a poor by-product recovery made profitable operation difficult. With a change in management philosophy and the appointment of Mike Sanem as plant manager, conditions began to improve prior to the plant closing. However, we felt profitability was not possible with immediate increased labor costs.

Next Pearson predicted the future of S.F. within the context of a changing industry, and set forth an analysis S.F.'s then current operations and "the action which needs to be taken to insure a bright future." The Schuyler operation was described as efficient and highly productive having a "reliable workforce" and excellent management. The Schuyler facility was described as the finest in the industry. Its future was glowingly described.

With respect to the Spencer plant, Pearson explained that, despite its location in an excellent cattle procurement area and the expenditure of $3.5 million in 3 years, and certain freight advantage operations, there were marginal profits since 1970. His analysis of the Spencer plant problem set forth in that letter is of utmost significance. Dudley testified that the analysis was studied by LOL thereafter and was concluded to have had merit. Pearson's analysis is as follows:

> The poor operating results have been due to an older facility, inconsistent management, and a high-cost unproductive labor force.
>
> With the recent capital expenditures, most of the inefficiencies created by the older facility have been corrected. The outdated hide operation and the lack of a new kill floor still inhibit production, but the facility should be competitive.
>
> Prior to 1970, the Spencer plant paid a labor rate comparable to that of the old major packers (Swift, etc.). Management correctly predicted that the independent packers with substantially lower labor rates would ultimately dominate the beef slaughter business. (Today IBP slaughters substantially more cattle than all the older major packers combined.) The Spencer plant took an eight-month strike to break from the standard contract. The victory was partial. Although the base hourly rate basically followed the IBP-Dakota City rate, more than twice the job classifications (at $.05 per hour per classification), substantial additional fringes including a pension and unsatisfactory maintenance qualifications placed the labor costs for the plant at a substantial disadvantage. More importantly, productivity and pride in workmanship suffered.
>
> During this period, management failed to carry out a consistent labor relations policy. The vacillation between a hard-line and soft-line approach to labor brought on by a succession of plant managers lent little credibility to the Company's position. None of these managers prior to Mike Sanem attempted to build the rapport and earned respect of the work force, necessary to effectively operate the plant.
>
> As is obvious, *the greatest need at the Spencer plant is improvement of the management-labor relationship. Mike Samen can accomplish this objective.*
>
> The attached plan provides for an opening of the Spencer plant on a one-shift basis (as opposed to the present two-shift) with a substantially reduced labor force on a free-standing basis. With the daily overtime flexibility allowed by one-shift and a six-day work week, two-thirds of the present volume can be obtained at a reduced cost. Working with a smaller labor force provides a better atmosphere to build the type of relationship with labor necessary for successful operation.
>
> The one-shift operation of the plant presents a great flexibility for the plant. Depending upon opportunities arising in the beef industry, part of the existing Spencer facility could be converted to a fabrication facility. The only major addition would be a box storage facility, as much of Hartley's equipment could be utilized. A hindquarter fabrication operation (which historically has a higher fabricating margin) would fit well with the current kosher kill. This Spencer fabricating operation is only a possibility and not part of the current plan.
>
> *Assuming that stable labor relations within a competitive cost structure can be implemented,* the Spencer facility should earn between $500,000 and $1,500,000 annually under a kosher program. New ownership would seem to be the best vehicle to accomplish that goal. [Emphasis added.]

With respect to S.F.'s other plants, Pearson suggested changes in their operation or disposition. By that time the tanneries had already been leased to a third party with an option to buy.

Dudley testified that, although LOL found merit to Pearson's analysis of S.F.'s problems, the plan for changes attached thereto was not automatically adopted by LOL which considered it merely as part of a "sales pitch." LOL, he testified, desired to make its own plans for improvement. However, certain essential elements of that plan were implemented.[4] Dudley did not testify as

[4] Pearson's plan proposed a reduction in wage rates; payment of an average rate of $6 per hour; elimination of 18 cleanup work jobs by subcontracting; and reduction in fringe benefit costs. When the plant subsequently reopened, the wage paid was $6 per hour, cleanup work was subcontracted, and also the kill floor and hide area were remodeled at a cost of $1.3 million. Although the fringe benefit cost is unknown, Dudley clearly agreed that the cost should be reduced.

to how he interpreted Pearson's reference to a "reduced labor force on a free-standing basis."

Thus in a matter of weeks subsequent to the plant closure, S.F. was no longer pursuing a plant to dispose of certain assets but rather was soliciting LOL to acquire an ongoing business, as Pearson in his letter refers to the "acquisition of Spencer Foods, Inc.," and provides a prospectus for the entire operation under new ownership.

At this point the question arises: What was the relationship of the unit employees to S.F. during the hiatus which ensued subsequent to the Spencer plant closure and its reopening 16 months later? In resisting the unit employees' attempt to obtain unemployment compensation, S.F. represented to the Iowa Department of Job Service Claims Department, on November 22, 1977, that its operations ceased following a failure to reach a collective-bargaining agreement and that the unit employees were unemployed as a result of a "labor dispute between the Company and the Union." The employer's position was rejected and it was concluded by the state agency that the employees were unemployed because the plant was closed and put up for sale. However, there was no indication that the state agency was privy to S.F.'s attempts to seek acquisition of an ongoing enterprise by LOL and to reopen the Spencer plant as stated in Pearson's letter of November 15 as a successful venture under "new ownership."

About December 15, employees entitled to accrued vacation pay received vacation checks by mail with an attached note signed by Plant Manager Mike Sanem which stated: "Pursuant to the contract with your Union, we are paying you your accrued vacation checks in conjunction with the Spencer plant closing . . . . This check is your final compensation payment from Spencer Foods, Inc."[5]

Negotiations between S.F. and LOL continued. LOL persisted in its desire to acquire only the Spencer and Schuyler plants for which in January 1978 it made an offer of $10 million. It also desired to pursue its policy of acquiring those facilities by means of an assets purchase. As negotiations proceeded, it became clear that a simple assets purchase would effectuate a substantial Federal tax disadvantage. Either the purchaser, or the seller, depending on contractual undertaking, would have been required to pay the Internal Revenue Service a recapture tax with respect to certain investment and depreciation allowances if the seller did not continue in existence for a prescribed period of time.

It was therefore agreed between the parties that in order to avoid this tax liability LOL would purchase the bulk of shares of S.F. stock (which was in large part held by a few individuals of whom Pearson was major shareholder) and would acquire the remaining stock subsequently by a reverse stock split, the details of which need not be recited herein. Furthermore, it was agreed that the major stockholders would undertake or warrant that failing the disposal of the four unwanted facilities that they would individually purchase same. The major stockholders further warranted that they would assume liability for certain lawsuits, etc., that had been incurred prior to the stock sale.

Initially LOL sought to accomplish its objective through the creation of a subsidiary cooperative which it created for this purpose, i.e., the Mid-West Cattle Producers Cooperative. That entity existed from July 1978 through September 1978 but failed to achieve adequate funding and LOL decided to proceed to acquire the S.F. stock directly. The initial shareholder agreement of July 11, 1978, was terminated and a revised shareholder agreement was executed on September 21, 1978, which set forth the conditions for the tender offer of stock. Under the agreement LOL paid $14 a share for common stock and $20 a share for preferred stock. An escrow fund of $1 million was created with respect to the above-described warranties by the major S.F. stockholders of whom there were five and who are described in this proceeding as "insider" shareholders.

On October 2, 1978, a tender offer was issued and subsequently accepted before the October 27, 1978 expiration date. Ninety-five percent of shares were tendered, and the balance acquired by the reverse stock split plan.[6]

Meanwhile, information as to these negotiations became public. In February or March 1978, Union President Lauritsen read in the Wall Street Journal an account of the LOL plan to acquire S.F. He also read other news articles concerning the creation of the Mid-West Cattle Producers Co-op. About March 18, 1978, Lauritsen sent a letter to S.F. addressed to Eastwood, and to LOL Industrial Relations Director Huron wherein he alluded to press reports of LOL's attempts to purchase the stock or assets of S.F. and he identified the Union as bargaining agent for unit employees at the closed Spencer plant. In that letter Lauritsen welcomed what he referred to as announced plans to reopen the Spencer plant under new ownership and stated that "the employees of this plant are available for return to work upon notice." He further stated: "We hereby request an opportunity to meet with the appropriate representatives of management to resume negotiations with respect to the terms and conditions of employment at the plant."

During the summer and fall of 1978 Lauritsen continued to receive information as to the tender offer of stock but received no responses from S.F. or LOL. On August 18, 1978, the Union, in writing, requested information data from the Respondent concerning the tender offer. Having received no responses, Lauritsen, on November 7, 1978, again addressed letters to S.F. and LOL wherein he alluded to press reports of the stock purchase and plans to reopen the Spencer plant. He again reasserted the Union's position as bargaining agent for the Spencer plant unit employees, and again recited the employees'

[5] In May 1979, S.F. filed an annual report with the U.S. Internal Revenue Service with respect to pension plans for the taxable year ending October 28, 1978, wherein it claimed that no financial statements were prepared for the unit employees' plan because the employees were "on strike" as of the beginning of the plan year and the plan was terminating.

[6] In the tender offer there is a reference to the closed status of the Spencer plant and a statement that S.F. had made efforts to sell it but that S.F. is uncertain of what course of action it would follow in the event of nonacceptance of the tender offer. Furthermore, the only reference to the Union therein is that S.F. and the Union had been unable to reach agreement on a contract and that as of the date of tender offer no agreement had as yet been reached.

readiness to return to work and the Union's desire to negotiate terms and employment conditions.

On November 17, 1978, Huron responded by letter to Lauritsen wherein he asserted that LOL did not currently have employees at Spencer, Iowa, nor did it "contemplate the hiring of employees at such location." He stated that S.F. had been requested to respond to Lauritsen's letter. By letter dated December 13, 1978, Eastwood, under the letterhead of S.F., responded to Lauritsen. He confirmed that plans were being reviewed to reopen the Spencer plant and said that an announcement was imminent. He stated that an announcement would also be made "as to the time and manner of making application for employment," and, "such applications will be taken from all interested persons, including both former employees of Spencer Foods at the Spencer, Iowa operation and other interested persons." He asserted that since October 31, 1977, there had been no production employees at that plant and that they had been "terminated" on that date. Further, he stated that for this reason "and the fact that the plant will be opened as a new operation for the benefit of Land O'Lakes farmer owners, we must reject your claim and inform you that there is no legal obligation to bargain with your Union over terms and conditions of employment when the Spencer plant opens." Accordingly, he rejected the offer to meet with Lauritsen.

After the acquisition of S.F. stock, certain changes were effectuated. S.F. continued as a corporate entity with its headquarters located at Spencer, Iowa. Its articles of incorporation were amended so that it was able to operate as a farmer cooperative. S.F.'s board of directors was replaced by board members and managers of LOL. Hofstad became chairman of the board of S.F. Pearson remained as president of S.F. and became vice president of LOL's new "beef division," i.e., an internal reference to the Spencer and Schuyler operations. In fact, Pearson remained as the chief executive officer of S.F. and remained responsible for day-to-day operations, as Dudley testified, because of his experience and proficiency. Pearson became subordinate to Dudley who in turn reported to Hofstad. Dudley operated out of LOL's Minneapolis headquarters as group vice president of "red meats." Dudley was not in charge of day-to-day Spencer and Schuyler operations, but Pearson was in control of S.F. as before but now subject to goals, objectives, and financial policy as determined by LOL.

Following the stock purchase, all administrative functions of S.F. continued to take place at Spencer, Iowa, including payroll, sales, purchases, etc. Dudley testified that following the lapse of time required to escape the IRS tax recapture problems, the corporate "shell," as he characterized S.F., will be dissolved and all management and administration will be transferred to a new headquarters in Minneapolis.

Eastwood, who had been executive vice president, thereafter became vice president of operations of S.F. but surrendered all financial responsibility to LOL.

After the stock purchase, LOL provided advice to S.F. with respect to transportation and carriers, financing and credit management. Cattle was thereafter purchased by checks issued by LOL although actual purchasing was done at Spencer by S.F. Attempts were made to purchase cattle from the cooperative farmer members but purchases of local cattle continued.

With respect to the Schuyler plant, operations continued without hiatus and without change. The local managers, supervisors, and the approximately 1,000 production and maintenance workers were unchanged. Recognition continued of Local 106, United Food and Commercial Workers International Union, AFL-CIO, and the collective-bargaining agreement with that unit was honored.[7]

The Hartley plant was purchased by the prior "insider" S.F. stockholders and thereafter closed in 1977. Those stockholders also purchased the Wisconsin Tannery, and the remaining facilities were disposed of or closed.

With respect to the Spencer, Iowa plant, during the hiatus it had been maintained by a small caretaker crew. The former supervisors and managers had, according to Eastwood, been "dismissed." Subsequent to Pearson's November 15, 1977 letter to Hofstad, there is no evidence that S.F. made any effort to sell that plant to any third party. Indeed, Pearson's proposed analysis projected the reopening of that plant under the ownership by LOL of S.F.[8] Although Eastwood and Dudley testified in depth as to the transistion of ownership, there was no testimony to the effect that any consideration was given by LOL to disposing of the Spencer plant. In fact, it was the original objective of LOL to acquire and operate both Spencer and Schuyler plants. It seems clear then, from at least as early as November 1977, it was ultimately intended to reopen the Spencer plant upon the acquisition of ownership of S.F. by LOL, and further that S.F. had abandoned its intention of disposing of the Spencer plant in light of LOL interest in it as part of a package acquisition. Furthermore, I conclude that the only reason the Spencer plant was not reopened earlier was the delay resulting in negotiating and executing a transfer of stock from S.F. shareholders to LOL.

The question next arises: What of the status of those unit employees who were unemployed because of a short-lived desire to sell the Spencer plant? In November 1977, as we have seen, LOL informed the Union that it had no employees in Spencer and had no intention of hiring any.[9] S.F. informed the Union in December 1978 that the former employees had been terminated at the time of the plant closure.

Dudley's testimony regarding the decision of reopening of the Spencer plant and the decision of whom to employ there is marked by an extreme economy of infor-

[7] There is no history of labor problems at Schuyler. No strikes have occurred there. The collective-bargaining contract there provides for a less costly wage and benefit package than that of Spencer prior to closure.

[8] Eastwood testified that the value of the Spencer plant itself was "pretty low." In fact, S.F. had only an equitable title to the plant. Legal title passed to a governmental creditor under a bond arrangement. The liability on that bond was "inherited" or retained by the S.F. corporate entity after stock acquisition as did certain other liabilities.

[9] This latter assertion appears to conflict with Respondent's position that S.F. ceased to exist and was replaced by a de facto subdivision of LOL.

mation. The thrust of his testimony as a whole suggests that the plant reopening was a foregone conclusion, i.e., that LOL needed the Spencer plant as part of its red meat operation. There is no testimony as to who decided or when it was decided to reopen that plant. Furthermore, there is no testimony that any manager or officer of LOL entertained the idea of reinstating the prior work force as a group as offered by Union President Lauritsen. A most natural question in such circumstance is why a new plant owner would not want to employ the same employees who had worked at the same plant for many years doing essentially the same jobs. The Respondent argues that the old work force was undesirable. Much evidence was submitted to demonstrate that the work force ultimately hired was more productive. But this evidence, assuming its validity, consists of subsequent post-reopening studies which derives its data of the new operations from a period commencing in November 1979. Similarly, testimony as to various unsatisfactory elements of the prior work force, e.g., slowdowns, hidden switches that disrupted production, etc., is not relevant to the issue of motivation for the refusal to reinstate employees as a group because evidence of such elements was not shown to have been known by LOL personnel who purportedly solely made the decision to hire a new work force at the time that decision was made.

Dudley's testimony was much more cryptic with respect to what information LOL had within its awareness when it made a decision to hire new employees. Dudley testified that he was provided immediately with a copy of the November 1977 Pearson letter which referred to employee unproductivity, high workers' compensation costs, and excessive absenteeism. He testified that he had been investigating prospective plant acquisitions since 1975 and had obtained information regarding their costs of operations. Therefore in December 1977 he made comparisons with the costs of operations of those plants with that of the Spencer and Schuyler plant in order that he could come to a conclusion as to whether S.F. costs were "out of line" and, if so, were "curable." Essentially, he attempted to make a kill cost comparison, i.e., what it costs to kill an animal over a fixed period of time. He then constructed a chart comparing kill costs of six plants, including Spencer and Schuyler. These plants concededly do not necessarily reflect the industry as a whole but represent only the prospective acquisitions with which Dudley was familiar. That chart was then submitted in evidence as Respondent's Exhibit 24. In short, the information thereon indicates that the Spencer plant was higher in its kill cost of $25.34 than the other plants which ranged from $17.88 to $21.01. The particular area of higher costs was in the data revealing the cost of wages and plant benefits, i.e., pensions, health and welfare benefits, *and* workers' compensation costs with respect to the kill cost of an individual animal. The information does not reveal a comparison of absolute wage and benefit costs. Dudley testified that some plants had higher wages but because, presumably, employees were more productive, the kill costs of wages and benefits were lower. He did not provide this more definitive data in his testimony, nor did he identify those companies with higher absolute wage rates. No definitive testimony was adduced as to the specific contribution employee nonproductivity made to the kill costs at Spencer. Dudley merely testified that he concluded that the Spencer employees were unproductive because the absolute higher costs of their wages and benefits were not the sole reason for the higher kill costs.

With respect to the reference to higher workers' compensation costs, and absenteeism, Dudley's testimony failed to reveal whether or not he made a contemporaneous study of the actual extent of workers' compensation costs and causes thereof, or whether he evaluated data concerning absenteeism, the nature of or reasons for absenteeism, and its comparison with these other prospective acquisitions, or with the industry as a whole.[10]

Dudley identified a graph which compared the head per pay-hour slaughtered from November 1976 through October 1977 between the Spencer and Schuyler plants which purportedly discloses a higher productivity for the Schuyler plant. He testified that it is his conclusion that Spencer was less productive. That graph was constructed for purposes of this proceeding. Dudley failed to testify that he made such a study prior to a decision not to rehire the former employees.

Dudley conceded that he was advised on the need of remodeling of the Spencer plant in order to improve its efficiency. Assuming the validity[11] of the productivity comparison between Schuyler and Spencer, i.e., that it compares identical data, Dudley failed to testify that his studies penetrated to the causes of a productivity discrepancy. Despite the Respondent's great reliance on Pearson's November 1977 letter as a basis for negative conclusions by Dudley as to the Spencer work force, an examination of that letter fails to indicate a condemnation of that work force as unproductive because of poor workmanship or lack of effort. Low productivity is not synonymous with low employee effort. At most, Pearson complained of less able employees hired in 1976 in part because of the lack of availability of better workers in a period of high area employment. The ability of the entire work force was not condemned by Pearson. Rather, he complained of their "union versus company attitude." In fact, Pearson placed a great deal of blame on management for an absence of a proper mangement-labor relationship necessary for an effective operation. His letter speaks of a multiplicity of factors which contributed to a loss of profits. He referred to inefficiencies caused by the facilities of the old plant, and predicted that with plant improvements the facility "should be competitive"; and indeed he had pointed to an improvement already in process prior to closure pursuant to a change in manage-

[10] Eastwood testified generally that, prior to stock purchase, Dudley had requested and had been supplied with data concerning insurance cost, workmen's compensation costs, and costs relative to the facilities. The details and nature of this information was not disclosed in his testimony.

[11] I cannot conclude that this graph constitutes a valid comparison of productivity inasmuch as it is premised on a comparison of pay hours and not man-hours, i.e., it fails to take into account the impact of overtime. Thus 1 hour of overtime equals 1-1/2 pay hours. The record discloses that Spencer worked substantial overtime but is silent as to Schuyler. Similarly, productivity comparisons of the new operations were based on a comparison of pay hours. The new operation did not work Saturdays and therefore had substantially less overtime.

ment philosophy. As to those factors delineated by Pearson, Dudley was strangely silent. No testimony was adduced as to what evaluation, if any, was made by Dudley or Hofstad as to the possible impact upon productivity of factors other than individual worker ability, e.g., supervision, training, tools, equipment, motivation, morale, incentive, discipline, etc. Indeed, Eastwood in his testimony conceded that a variety of factors enters into an analysis of productivity. At one point Dudley testified that he had made no study of the impact of plant renovations upon later productivity and testified that he did not know the impact. Subsequently, he testified, in conclusionary terms, that certain innovations did not account for later productivity improvements.

Within a context of what appears to be a very superficial study by Dudley of former employee worth prior to the plant reopenings, it was decided not to accept the union's offer of a reinstatement of the prior experienced work force. Dudley testified with respect to the hiring of employees:

> What we were after and what we stated was that we had to re-open the plant on a competitive basis. Otherwise, we were not required to re-open it, therefore, we had to hire the best available work force that we could find.

Accordingly, after consulting with Hofstad, Dudley instructed LOL Industrial Relations Director William Huron to "hire the best possible work force," and that despite Dudley's negative conclusions of the prior work force no "specific" instructions were given with respect to former employees. There is no evidence that, prior to this instruction to Huron, Dudley or anyone else engaged in a study of the former employees' personnel records.

William Huron testified as to the methods and means involved for the hiring of employees. He testified that he developed a set of hiring criteria which:

> . . . came primarily as a *result* of the acquisition of Spencer Foods by Land O'Lakes and the desire on the part of Land O'Lakes to start up the plant and a *need to recruit and hire a totally new work force.*

He developed this criteria in late December 1978. In doing so, he did not visit meatpacking plants to gain an understanding of problems in such plants. He did not visit the Schuyler plant. All the criteria was admittedly not applied to every LOL plant. Commencing in December 1978, Huron initially testified that he evaluated records of the Spencer plant, i.e., "workmen's compensation costs, absenteeism records, things of that nature." Subsequently, he testified that he did not inquire as to records of the specific types of injuries or medical problems but rather he obtained "general indications from people [at Spencer] as to the high cost rates for workman's comp . . . ." With great uncertainty and lack of conviction he testified that he may have discussed the nature of the plant accidents in terms of "propensity" of people for injury with Eastwood. Similarly, with respect to absenteeism, he evaluated no written data but again with uncertainty testified that he had discussions with Eastwood about absenteeism. He had no recollection of discussing the amount of lost time due to plant accidents prior to closure. Although Eastwood testified that absenteeism had been high, he conceded that his knowledge in that area was limited because he had not been involved in personnel work. Eastwood failed to testify that he provided Huron with any information relating to employee propensity to injury or sickness.

There was no evidence that Dudley or Huron analyzed the pertinent statutory provisions of Iowa, Nebraska, or other States to determine whether or not there was any difference in allowable benefits that might contribute to a higher workers' compensation cost at Spencer.

Lauritsen testified as to the activities of the Union in giving information, advice, and assistance to employees at Spencer regarding workers' compensation claims. Dudley did not testify as to whether he made any distinction between the propensity to accidents, and the propensity to file and process claims.

In January 1979, Huron testified that it was decided that approximately 200 employees would be hired at Spencer, and hiring commenced that month. Huron did not explain why in the absence of any specific instructions from Huron as to former employees there was a need to hire a "totally new work force." He did not engage in a study of prior employee personnel files. He did not interview the former employees, nor solicit their individual job applications. Rather, he consulted with Manager James Reed of the Iowa Department of Job Service, a state employment referral service, and was advised that sufficient applicants could be obtained from the open job market for jobs starting at the $6 rate. Unemployment in Spencer in October 1977 rose from 1.9 percent to 5 percent. However, the major factor for that rise was the closure of the Spencer plant which was then one of Spencer's largest employers. It is not clear what, if any, change in local employment occurred apart from the plant closure. Thereafter, Huron engaged in an extensive 3-month or longer advertising campaign in the newspaper, radio, and television stations in a wide area of northwestern Iowa, soliciting job applicants. Included in solicitation efforts were recent high school graduates. It was Huron's expectation, as he so testified, to receive a large response from persons of no past experience in the slaughtering and meatpacking business. In fact, no particular emphasis was placed on slaughtering and packing experience, skill, or training. The Iowa Job Service assisted in the hiring process by initially interviewing and screening applicants pursuant to the criteria developed by Huron and according to Huron's directions until March when it was decided by that agency that it did not possess adequate expertise with respect to certain medical or physical criteria therein. Only those persons who applied for employment, and who were not initially screened out by the Iowa Job Service, were considered. It is unknown as to how many applicants were screened out by the Iowa Job Service and who therefore did not file a job application, and did not proceed through to interviews in Spencer by Huron and two other LOL managers, Terry Koyes and Don Leidhauser. The inter-

views were held at a hotel as renovations were taking place at the plant. Written applications were received at a rate of 60–100 a day, and by the opening date of the Spencer plant on February 26, 1,100 were received by Huron of which approximately 250 were former unit employees. Of the 250 former employee applicants, about 70–75 were processed to interview by the LOL personnel. On the day of the reopening of the plant, of the 69 employees hired, 22 or 23 were former unit employees. Huron testified with uncertainty that of 70–75 former employees interviewed, he "did not recall" a "single one" that did not receive a job offer.[12] Upon reopening of the plant, the interviews continued at the plant.[13] A total of 2,000 written applications were submitted, and between 30–40 former unit employees were ultimately employed. About 260 to 276 former employees ultimately applied for work and were rejected. In 1979, the Spencer plant employed an average of 200 employees to fill approximately 220 projected positions. However, of a total of 525 persons that were hired, 275 were terminated that year alone, an amount equal to the number of former employees who had been rejected.

The Spencer plant resumed operation under a new plant manager, i.e., recently hired Dennis Heineman. Of 19 supervisors and managers now employed, 7 had been employed prior to closure. Barry Parks was hired by LOL and entered on duty as the S.F. human resource director at the Spencer plant on March 1, 1979. Leo Lang had been the Spencer plant kill floor supervisor at closure. Contrary to Eastwood's testimony that all supervisors were terminated, Lang testified that he had transferred to the Schuyler plant as a night-shift supervisor. When the Spencer plant reopened, he returned as plant supervisor in charge of production and in August 1980 became plant manager.[14] Huron testified that Lang was utilized as a reference check on former employee applicants after Huron had reviewed the employees' personnel files. He described Lang as a primary source of information and, because of his past experience as a union officer, an objective source of information "since he had been on both sides."[15]

The Spencer plant resumed, according to Pearson's suggestion, as a one-shift operation. Previously it had performed a kosher kill operation on the first shift, and a predominantly nonkosher kill on the second shift. Now it became a total kosher operation. Basically, the production process was the same. However, $1.3 million or 10 percent of the total stock purchase price was spent on physical plant improvements. According to Dudley, the kill chain[16] was extended to accommodate more employees and thus boosted the "chain yield," i.e., the number of head of cattle killed per hour. Huron characterized the other changes as "cosmetic," i.e., painting, plastering, etc. However, Eastwood testified that there were numerous physical changes such as new equipment, e.g., gut tables, trolley wash, inedible fat chute, hide puller, a side puller, saws, hide flesher,[17] and also a new offal room, storage areas, and laundry room were installed; and several operations rearranged. Some jobs were eliminated and some combined. There was much conclusionary testimony adduced as to how all these changes at a cost of $1.3 million did not have a direct relationship to productivity. Eastwood in his testimony was more restrained in dismissing the impact of renovations on productivity. Eastwood testified that an extended kill chain allows more men on the line and, although it does not necessarily result in greater output per man, the result of these changes may have enabled some functions to result in the production of more head per man. He cited as an example the use of new equipment which enabled faster work, and a faster movement of hides within the plant.

Although Eastwood initially testified that there was a "dramatic" change in customers, what occurred was that the Spencer plant now catered exclusively to its kosher customers. The old customers were retained with "some" changes. New kosher accounts were solicited and obtained. As indicated earlier, the Spencer plant continued to draw upon the local cattle source, and there is no evidence as to what percentage of cattle was now purchased from farmer cooperative members.

The employees at the Spencer plant, as the employees at Schuyler, were paid by S.F. The business continued to be held out to the public as Spencer Foods, Inc., although its ownership by LOL was publicly known. In September 1979, LOL was the purchaser of the Oakland, Iowa plant, an ongoing beef slaughtering operation of American Beef Packers, Inc., by way of an assets purchase. The purchase agreement was in the name of S.F. The existing 200 production and maintenance employees were retained, and became employees of S.F. The management of the Oakland plant was placed under Pearson's supervision. The existing collective-bargaining agreement with the United Industrial Packing and Allied Workers Union covering the workers at the Oakland plant was assumed by S.F.[18]

B. *The 8(a)(1) Allegations*

The complaint alleges that in December 1978 the Respondent by its agent Earl Junior Curry suggested to an employee that the Respondent would not permit employees at the Spencer plant to be represented by a union.

[12] His estimate of "70–75" was based on a "gut feeling."

[13] Prior to the resumption of production, approximately 10–15 construction employees were hired to assist in plant renovation. Additionally, 8–10 former employees were hired on a "temporary" basis to assist the construction workers.

[14] Lang testified that, when operations resumed, the new employment force exhibited a total lack of experience which adversely affected productivity. He insisted, however, that they improved to the point where they became "very good." In fact, plant production during 1979 fell substantially below the desired kill rate and the goal of 200 head killed per hour was not reached until June 1980.

[15] Several years earlier Lang had resigned his union position prior to supervisory appointment. Subsequent to a series of disputes with fellow union officers whom I credit as more certain, detailed, and convincing in this regard than Lang, he threatened the union officers, including Lauritsen, that he would "get even." Lang's testimony revealed that he considered Lauritsen as "too radical," and prone to lead the union members in work stoppages.

[16] Comparable to a conveyor belt system in an automobile assembly plant.

[17] In 1977, a new cooler had been installed and an extended kill chain had been considered at that time but was abandoned for financial reasons.

[18] That contract had a significantly less costly employee benefits package than the pre-closure Spencer plant contract.

Former unit employee Frank Angelo testified that in late November 1978 he had been employed by another employer on a job excavating sewer lines, when his pre-closure kill floor Foreman Curry happened to encounter him at the excavation site. It appears that Curry had been driving a truck and had stopped when he noticed another former employee, Mike Hawn, on that site. What Curry was doing driving a truck at the construction site is not known, nor is it known if he also was employed by the excavating company. In any event, according to Angelo's uncontradicted testimony, Angelo and Curry and former employee Mike Hawn decided to take a break at a nearby cafe in Arnold's Park where they engaged in a conversation wherein Curry discussed various topics, including animal trapping. Angelo interjected a question as to how things were going at the Spencer plant and Curry replied that everything was "torn to hell" but that plans called for certain renovations. Angelo asked how soon he would be called back to work at the Spencer plant and Curry responded "that the union wasn't going to get back in," and that there were "too many problems." Curry was inhibited in verbally reprimanding employees and further stated "that is some of the things they are going to eliminate." Also to be eliminated, Curry said, was the assignment of deferential work to female workers.

Although Curry had in fact been a supervisor within the meaning of the Act, prior to the closure, there is no evidence that he held a supervisory position at the time of this conversation. There is no evidence that he participated in the employment of any employees at the reopened plant or acted in any capacity as the Respondent's agent or spokesman. Therefore I conclude that there is no basis to support a finding of a violation of the Act based on Curry's statement of what appears to be his personal opinion to Angelo.

The complaint alleges that in March 1979 Leo Lang threatened employees that Respondent would not recall employees because of their membership in and activities on behalf of the Union and that Respondent would not permit employees at the Spencer plant to be represented by the Union. Four witnesses testified as to a meeting in April 1979 held at the Scorpion Lounge in Storm Lake, Iowa, 36 miles from Spencer, Iowa. The meeting was held pursuant to a request by employee Edward Feldhacker, for the purpose of discussing the possibility of recalling to work as a group 40 or 50 employees. Attending the meeting were Feldhacker, former unit employees Jerry Ward and Roger Daugherty; and Leo Lang; and the plant nurse, Deanna Gesink. Feldhacker, Ward, Lang, and Gesink testified. Because of the inconsistencies between the testimony of the General Counsel witnesses, Ward and Feldhacker, and because of Feldhacker's admitted difficulties in recalling a conversation, wherein he consumed many alcoholic drinks and because of his uncertain demeanor, and internal inconsistencies, I cannot conclude that the General Counsel has submitted credible testimony to support this allegation of the complaint. I conclude that at most Lang informed the employees that, because of the substantial progress made in hiring by that date, and the limited number of openings available, not all employees would be recalled. However, I credit the uncontradicted testimony of Feldhacker that Lang complained to them about the employment at the newly opened plant of "green horns," of Lang's difficulties in getting his work done, of the lack of experience of 7 of every 10 persons hired, of the advantages of recalling experienced employees who would be able to teach work skills to the "green horns." This testimony is consistent with Lang's admissions in other testimony of the inexperienced nature of the newly hired employees, and the adverse effect it had on productivity. The meeting ended with Lang's promise to check with his supervisors. In fact, Lang communicated with Heineman and Eastwood about recalling former employees as a group, but he was instructed not to pursue the matter, i.e., not to deviate from the process of individual applications and processing described above. Feldhacker thereafter received no response from Lang.

It is alleged in the complaint that during March 1979 Plant Manager Heineman told an employee that the employee would never return to work for the Respondent because of the employees' refusal to cross the Union's picket line. On the date of the reopening of the Spencer plant on February 26, the Union conducted picketing at the plant with signs protesting "Spencer Foods Unfair to Labor." Local newspaper accounts described the picketing as "violent." Huron testified without contradiction that he observed picket line conduct in the form of the blocking of ingress to the plant, banging of automobiles, throwing objects, utterance of "aggressive remarks," and "intimidating behavior." Subsequently, S.F. and the Union each cross-petitioned the Iowa District Court for injunctive relief against acts of violence. A consent injunction against violent conduct subsequently issued. The picketing, however, continued thereafter and has not ceased.

Daryl Frerichs, a pre-closure unit employee, was hired through the above-described hiring process, in construction work at the plant commencing on February 7, 1979. He and the entire group of "temporary" construction workers were told at a mass meeting shortly before February 26 that they would commence working "full time" thereafter. Frerichs worked until March 6, 1979. He told his foreman that he would not cross the picket line in the future. He was asked to work a few days more which he did. Frerichs testified that on March 8, in Plant Manager Heineman's office in a meeting with Heineman and Lang, Frerichs said that he would cross the picket line no more, and that Heineman told him that his name would be placed "on a list" and that the only way he could "get back in" was if the Union gets "back in." Frerichs did not return thereafter.

Heineman did not testify. Lang testified that Heineman attempted to persuade Frerichs to keep working, after Frerichs said that he was going to "quit" because he did not want to cross the picket line, and that Heineman said "if you quit now I probably won't need you later after we get a full complement of people." Lang explicitly denied Frerichs' testimony. I find Frerichs to be the more confident and certain witness as to their conversation. I credit him.

The complaint alleges that Human Resource Manager Barry Parks, in March 1979, told an employee that the employee would not be employed in the future because of the employee's refusal to cross the Union's picket line. Frank Angelo testified that in February 1979 he was interviewed by Huron who in the course of the interview stated that there was a picket line and that the local police were doing a good job of keeping the peace and that the number of pickets were gradually reducing. Huron also said he had hired 20 former employees and would hire more and intended to have the best possible work force. According to Angelo, Huron praised the newly hired workers and stated that the Company felt no obligation toward the Union. Angelo mentioned the picket line and Huron asked him if he would cross the line to report for work. Angelo stated that he did not want to cross the picket line. At that point Angelo asked whether his refusal to cross the picket line would lessen his employment prospects. Angelo testified that Huron responded that anyone who would not cross such a mild picket line would have no future chance of becoming an employee, and thereafter instructed Angelo to go home and "talk it over" with his family. Angelo conceded that he was in fact offered a job but he informed Parks by telephone at 5 p.m. that he would rather not cross the picket line; that he was concerned about his family; and that when he said he would report for duty when picketing ceased, Parks said "Okay."

Huron testified that during the interviewing of job applicants at the plant subsequent to its reopening there were occasions wherein he discussed the picketing. He testified that a number of times job applicants expressed concern over the picketing and refused a job offer because of the picketing. Huron denied that he told an employee that he would not be considered for future employment if the employee refused to cross the picket line. However, Huron testified that he told job applicants that if they honored the picket line that their job applications would be considered withdrawn, and that statements by an applicant to the effect that he would honor a picket line had the effect of terminating the interview.

Angelo impressed me as a spontaneous, forthright witness. He gave no impression of being a calculating witness, but was rather responsive. I find Huron's general denials less convincing. Throughout his testimony I found him to be a guarded witness whose answers were conditional or qualified. In this particular issue, his denial was qualified by the admission that the practical effect of an employee's expression of intent to honor a picket line was to nullify the job application, thus eliminating the employee from future employment consideration. I credit Angelo's more certain and detailed account of the interview with Huron.

I conclude that the conduct of Heineman and Huron constituted interference with employees' right to engage in protected concerted union activities, i.e., the job applicants were told, in effect, that if they honored a picket line they would not be considered for future employment at a time when the job applicant desired to work and when work was available.[19] By this conduct, I conclude that Respondent violated Section 8(a)(1) of the Act.

The complaint alleges that in April 1979 Parks interrogated an employee about that employee's union activities. Jay Anderson testified that he was initially hired in April 1979 for employment at the Spencer plant. Although he had no prior experience in slaughtering work, he had known Lang's son and had asked Lang for a job in April 1979. Lang referred Anderson to Parks who in turn referred Anderson to Iowa Job Services. Anderson was accompanied by former employee Ron Moriarity. They filled out applications at the Iowa Job Service. The next day Anderson alone returned to the plant where, on request, he was interviewed by Parks. Parks agreed to the interview in his office. Anderson testified that Parks asked him if he would have any "qualms" in crossing the picket line every day, and he responded that he would not. When asked by counsel for the General Counsel whether Parks asked him any other questions relating to the "subject of unions or picket lines," Anderson responded: "I believe there was a question on the application that I filled out, if I had ever belonged to a union before." When questioned further by counsel for the General Counsel, Anderson responded: "Well, I know I answered the question. I don't know if it was verbally or writtenly [sic]." He testified that he could not swear what Parks asked him. He testified, "I just can't remember." When questioned as to other topics of that conversation, Anderson protested an inability to recall the conversation with Parks.

Parks testified that he asked no applicant whether that applicant belonged to a union, nor did he ask about their union sympathies. He recalled the interview of Anderson. Parks testified that Anderson "made quite a point of the picket line" and asked what was going on and whether it was true "what was in the papers"; to which Parks answered "Yes." In light of Anderson's faulty memory, and unconvincing demeanor, I find him an unreliable witness, and I conclude that insufficient evidence was adduced to establish that Parks coercively interrogated employees concerning union membership or activities.

C. *Discriminatory Hiring Criteria*

The General Counsel and the Union allege that the job screening criteria developed by Huron for use by the Iowa Job Service was calculated to and did have the effect of discriminating against the employment of former employees. Respondent argues that the criteria was constructed for the purpose of hiring the best possible work force and that the criteria set forth by Huron was objective, justified by business considerations and calculated to favor neither former nor new employees, and was applied to every job candidate equally. The General Counsel and the Union contend that not only were the criteria inherently discriminatory, but that they were applied unequally in such a manner as to favor new employees. The criteria are as follows:

[19] Although the complaint alleges Parks and not Huron as one of the agents involved, Huron's conduct was fully litigated.

1. Necessary job skills.

A. The ability to lift sixty (60) lbs. or more on a regular basis.

B. Above average manual dexterity as evidence by past job history.

2. Interest in packing house work.

A. Describe working conditions and observe reaction.

Determine willingness to work in beef processing industry.

3. Obvious wage expectation versus wage schedule problems.

4. Work history.

A. Job stability as reflected in past employment.

For general labor in the plant, applicants should have held no more than three (3) jobs in the last five (5) years. Exclude layoffs due to plant closings.

B. Screen out individuals discharged from any previous employment.

5. Obvious medical problems/physical restrictions:

A. Tendonitis.
B. Lower back syndrome.
C. Active chemical dependency.
D. Allergies.
E. Dermatitis in the form of rashes when near blood, animal fat, chemicals, oils, detergents, etc.
F. Heart problems/high blood pressure.
G. Loss of limb(s)/fingers.
H. Respiratory problems/T.B./emphysema.

6. No more than one (1) member of an immediate family may work for Spencer Foods, Inc. Immediate family is defined as: spouse, child, parent, grandparent, brother, sister, in-laws (mother, father, brother, sister).

7. No more than an average of four (4) absences per year over the last two (2) years. Periods of hospitalization or major medical conditions to be separately evaluated.

8. No disciplinary warnings of any kind in the last eighteen (18) months. Past Spencer Foods, Inc. employees: May 1976—October 1977.

9. No more than two (2) lost time accidents in the last three (3) years. Past Spencer Foods, Inc. employees: November 1974—October 1977.

No argument is made that the ability to lift 60 pounds of weight on a regular basis is inherently discriminatory; however, although many jobs do involve the necessity to lift and shove, clearly not all former employees engaged in jobs requiring such ability, e.g., washing and cleanup, etc. With respect to criteria 2, an expectation of significantly higher wages tended to disqualify an applicant, and employees who were paid substantially higher wages prior to closure were more likely to react negatively to the starting wage offered. The number of persons screened out by this criteria appears to be negligible.

With respect to work history, medical problems, absences, disciplinary warnings, and lost time accidents, the former employees were to be judged by their records as established during their preclosure tenure at S.F., whereas new employees were to be judged on their most recent experiences as represented by them or revealed in job reference checks. Thus a former employee who manifested a rehabilitation within the hiatus period while employed with another employer would not benefit from such rehabilitated performance or improved medical situation.

The criteria which the General Counsel and the Union stress most forcefully as evidence of discriminatory intent relates to the prohibition against hiring more than one member of the immediate family, i.e., criteria 6 or "anti-nepotism" policy. It is argued that by this one criteria alone great numbers of former employees were screened out of employment. Prior to plant closure, it had become a common practice by S.F. to hire more than one family member. Approximately half of those former employees were related.

Respondent contends that LOL has maintained a formal, systemwide anti-nepotism employment policy since 1973, and that its application at Spencer was merely a routine application. LOL maintains 75 facilities in various States. Huron testified that he instructed Manager James Reed of the Iowa Job Services that to be considered further an applicant had to satisfy all criteria, otherwise no written application was to be taken. However, he testified that Reed was instructed to use a rule of reason. Huron also testified that he did not "recall" telling Reed to screen out and deny a written job application to an applicant who failed only one criteria.[20] However, he testified that LOL was "strong" on enforcement of the six criteria. Reed testified that the screening criteria was utilized at all offices of Iowa Job Services according to instructions he gave to the staffs of those offices and which were in accord with instructions he received from LOL Managers Huron, Koves, or Leidheiser, who acted as S.F. hiring agents. Reed instructed his staff as he was so instructed to use "common sense" and not to screen out applicants for "ridiculous reasons." However, Reed testified that he was instructed as to the particular necessity of criteria 1, 6, 7, 8, 9 and that criteria 6 was to be applied without exception.

Reed testified that many job seekers did not ask for an application after the interview and many, including former employees, were denied applications by his agency prior to March 1979, as a result of the application of the hiring criteria. It cannot be determined, however, how many job seekers were turned away or how many former employees were turned away as a result of the interview or as a result of learning of that criteria form other sources and thereafter deciding not to pursue a futile act.[21]

[20] In his pretrial affidavit Huron testified: "We advised Reed that anyone who failed to meet any one of the criteria set forth on [Exh. 20] were to be screened out in the first stages of the employment process."

[21] Based on Reed's testimony, it is apparent that Iowa Job Services and its manager James Reed acted as an agent for Respondent in the interviewing and hiring process. The motion filed by Iowa Job Services to strike par. 4(b) of the complaint is accordingly denied.

When examined as to whether rule 6 set a new policy for S.F. at Spencer, Huron testified uncertainly and unconvincingly: "I'm not certain. I don't believe they had a policy restricting the employment of relatives, so stating in so many words." He admitted that there have been exceptions to this LOL anti-nepotism rule. As the evidence in this case unfolded, it appeared that the rule was not applied to managers, supervisors, and temporary employees. Furthermore, the rule was not enforced at the Schuyler plant or at the Oakland plant. It is also not enforced at a LOL turkey processing plant in Albert Lea, Minnesota. Various Respondent witnesses testified that the rule is not applied to areas of relatively low population where the employment source is limited, nor applied retroactively to plants that have been acquired with an ongoing work force when relatives had been previously employed. However, relatives continued to be hired at the Schuyler and Oakland plants after the acquisition of those plants. Corporate Staffing Manager Koves testified that the Albert Lea plant had been in existence for 30 years and also is located in an area of limited employment resource. He admitted that the population of Albert Lea is about 20,000, i.e., double that of Spencer, that the total employment of the plant is only about 325, and that LOL hires employees from a wide ranging geographical area outside the city itself. Respondent's witnesses testified as to the subsequent large number of applicants who applied at S.F. retroactive justification for the decision to apply rule 6.[22] However, the only information Huron possessed prior to the construction of the hiring criteria was Pearson's November 1977 letter which, in part, complained of the acute shortage of unemployed persons in 1976, and the general assurances of Reed that there was a large pool of unemployed in 1978. Indeed, there was a large pool of unemployed in Spencer after the plant closure which included the former Spencer plant employees who chiefly accounted for the jump in the unemployment rate, according to Reed.

Thus, despite the purported desire to hire the best possible work force, hiring criteria was constructed which catered to the unskilled and inexperienced job applicant, but which instituted a policy unrelated to merit which is not universally applied elsewhere, in all circumstances and which inherently tended to adversely affect the hiring prospects of half the former work force. I find Huron's testimony to the effect that he did not consider the impact of that policy on S.F.'s past practice unconvincing and not credible, in light of Pearson's warning of employment resource difficulties, the expressed concern for a best possible work force, and the testimony concerning purported investigation and analysis of S.F.'s past operations by LOL of S.F. as a prospective acquisition.

A great mass of evidence was adduced by the General Counsel largely in the form of summaries of portions of personnel files regarding the issue of whether the Respondent applied its hiring criteria in a discriminatory fashion so as to favor the hiring of new employees and to discourage the hiring of former employees. Respondent attempted to rebut the evidence in large part with summaries of evide..ce and with testimony. An examination of the evidence leads me to conclude that despite protestations that all employee applicants were treated equally, the former employees were subjected to more stringent evaluations, and the hiring process was more conducive to the hiring of new persons. Furthermore, there is some evidence that Respondent manifested an interest in job applicants who expressed antipathy toward union representation.

There are notations in the personnel files of Respondent which record remarks of job applicants whom it hired concerning union representation. Applicant Alvin Andis, a former employee, is quoted as stating that there were "too many free loaders. [The] Union shouldn't protect them." Geraldine Bowers is recorded as stating that she is related to Lauritsen and that he "messed a lot of people up." Noted in the job rating form for Anthony Prodaga along with many other notations is the phrase "No interest in Union activity." Larry Christonsen, a former employee, was quoted as saying that the Union "got what it deserved in closing the plant." The interview file for Rick Oleson, a nonformer employee, contains, inter alia, a reference to his then present construction job which states "don't care for the union." Regarding many comments of applicant and former employee Bobby Dirks is found the entry: "Not too big in Union." Derald Thomas' file contains the notation "labor dispute—was non-union." William Smith wrote the following on his application: "I worked there before their labor dispute, but was off with a broken hand before this labor dispute took place. Was not involved." Del Drenths' file contains a handwritten notation which, inter alia, states "was involved in being harassed to join Union." The file of Steve Wallace, a Spencer employee in the summer of 1977, reveals a note by an interviewer which states: "he didn't want to go on strike, thought $$ were good, Leo Lang, pleasant place to work." The file of nonformer employee Daniel Coombs contains the remark: "says probably don't need union. Last strike didn't do any good at McQuay [former employer]."

Finally, with respect to the personnel file of former employee Richard Maranell, there appears the phrase "steward on night clean up—no problem" and the phrase "company oriented."

The foregoing, as argued by the General Counsel and the Charging Party, reveals that the union antipathy of some job applicants was of sufficient importance to be noted and recorded by the job interviewers.

Reference Checks: Huron testified that after a job applicant was interviewed, and had given a favorable impression, two final conditions preceded hiring, i.e., a successful physical examination and a reference check, the latter of which was characterized as "very tight" and "important." Huron testified emphatically that each job applicant was subjected to a reference check.

In the hiring of employees for the reopened plant, personnel files of the former employee job applicants were closely examined and scrutinized. Thus the Respondent

[22] Despite the immediate "flood of job applicants," the personnel records of Respondent contain a notation by Koves concerning the job applicant James Campbell wherein Koves expresses a reluctance to hire Campbell and an inclination to review the applicant later "if applicant flow problems continued." This comment was never explained by Koves.

made available to itself detailed information to evaluate former employees concerning absences from work, disciplinary warnings, and lost time accidents. However, the nonformer employee was purportedly subject to a work history reference check that was premised upon an employee evaluation form the answers to which were to be furnished by past employers. That form inquired as to the number and type of work accidents, but sought only generalized conclusions as to attendance and made no inquiry at all as to the issuance of past disciplinary warnings.[23]

The personnel records of over 200 successful applicants fail to reveal documentation of a reference check. LOL employee Dawn Meyer Hansen testified concerning the process of reference checking to which she was assigned by Parks. She testified that she utilized the aforedescribed reference check form and made inquiries by telephone. She described the context within which she made her reference checks as hectic and rushed. In part, she relied on information given her by Lang or other plant employees or supervisors who claimed to know the applicant. As to the contacts with supervisors or employees, she used no reference check form. Hansen conceded that she made no inquiry of the job applicants' current employers. Although she testified that she made reference checks as to a large number of job applicants whose files reveal no reference check, she could not recall making reference checks of many of these files. In most instances where a job applicant was recommended by a supervisor or employee, no contact at all was made with the applicant's former employer. The precise nature of the recommendation of these supervisors and employees was not revealed in her testimony. From her testimony I conclude that what information she did obtain from employees and supervisors was more generalized than that sought by the job reference check forms and included vague, subjective, secondhand impressions. She testified that no reference check was made for summer or temporary employees. As to job applicants of recent military experience, she merely made inquiry as to the rank achieved by the applicant. When questioned as to making reference checks for applicants whose files reveal no reference checks, she testified:

> Yes. There were a few that you would find out something and you know he was good and you sent him up for an interview and that was probably all that was ever done on him.

The evidence thus reveals that the Respondent had been provided with the names of former and current employers by job applicants but that it hired vast numbers of nonformer employees of whom there is no evidence of a reference check, or of whom it obtained a reference check which sought the most generalized information, whereas it rejected vast numbers of former employees based on detailed information carefully gleaned from their personnel records which covered a period of many years.

Medical History: As indicated above, former employees were judged by their prior S.F. records. Many were rejected in whole or in part because of information in those records. This information revealed such disqualifying references as "alcoholic;" "back problems;" "heart attack victim"; "acute lumbar, sprain low back syndrome"; "high blood pressure"; "heart attack '77"; "throat cancer '78. Hernia"; "Ulcer"; "hypertension"; "back and shoulder problems"; "back and neck problems"; "back sprain"; "neck injury." No effort was made to evaluate the current debilitative effect of old ailments of former employees. However, the personnel record of new employee Robert Fahrenkrog indicates that he was hired for construction work when the plant was renovated, and that it was disclosed that he had had a knee operation but the interviewer noted "no disability now." New employee Jerry Garret's file reveals that he was hired despite a 1977 corrective hernia operation. The personnel file of new employee Rebecca Wagner reveals the notation that she had had a "heart check up" in Iowa City but "has worked in physical hard work" and was a laborer at the time of the interview. The newly hired were required, according to Huron, to have passed a physical examination prior to actual employment and thus were given an opportunity to demonstrate their current state of health.

Work History: The Respondent's personnel records reveal that nonformer employees were hired despite a revelation by a job reference check or an interview of negative comments, despite prior job terminations, and despite past employment instability. However, those same files and other evidence submitted by Respondent reveal that Respondent considered counterbalancing positive information and extenuating circumstances, and thus excused and disregarded what would appear to be disqualifying factors. In this regard Respondent pursued a common sense approach and sought to obtain a full view of possible worth of a job applicant and evaluated the full circumstances involved. With respect to former employees, they were evaluated by the information that was set forth in their personnel files which was accepted at face value, but which at times was supplemented with a report of Leo Lang's opinions. Lang's testimony as to the negative aspects of former employees that he reported in the hiring process was generalized, impressionistic, conclusionary, and based in large part on suspicion, rumor, and some of which was based on isolated, remote, if not trivial misconduct, e.g., failure on an occasion to wear a "hard hat" in a required area; smoking a cigarette on one occasion in a prohibited area; leaving the plant on a "couple" of occasions to go to a restaurant across the street; parking in a prohibited area; horseplay involving squirting water at coworkers; a single absence for deer hunting on a date unknown.[24] Respond-

[23] The issuance of discipline was utilized, in whole or part, to disqualify approximately one-third of all former employees who had filed applications. A similar large percentage of former employees were rejected for absenteeism in whole or in part. Former employees were rejected if their history disclosed more than nine absences from November 1975 to November 1977.

[24] Lang expressed a disregard for the entire body of former employees. He premised his dislike on conclusionary testimony that they were unproductive. It is equally clear that he was resentful of the effectiveness

Continued

ent, however, seldom rejected a former employee for any one stated reason, but rather purportedly relied on several disqualifying factors.[25] Thus a former employee rejected in part because of past discipline may also have displayed a history of absenteeism or medical problems or other negative factors. However, as observed above, nonformer employees enjoyed a distinct advantage in that they were not handicapped by a detailed record of these other factors. Rather, they were evaluated pursuant to a very quick, brief reference check performed under rushed conditions wherein an application of common sense and an open mind afforded them the benefit of a doubt.

D. *Analysis and Conclusions*

1. The 8(a)(5) violations

The General Counsel alleges that the Respondent either as a continuing entity or alternatively as a successor employer violated Section 8(a)(5) of the Act by withdrawing recognition of the Union; by recalling employees pursuant to criteria that was unilaterally instituted without bargaining with the Union; and by unilaterally changing wage rates, benefits, and other terms and conditions of employment without bargaining with the Union. The General Counsel seeks a remedial order which provides for a restoration of the status quo ante, i.e., recognition of the Union, restoration of past wages, benefits and terms and conditions of employment, and a reinstatement of former employees who would have been recalled prior to past practice and contractual provisions, all of which would place the parties back in the same position prior to the unlawful refusal to bargain.

The General Counsel alleges further that Respondent discriminatorily refused to reemploy its former work force for the purpose of evading its obligation to recognize and bargain with the Union, and because of the former employees' membership in, representation by, and past support of the Union, and thus violated Section 8(a)(3) and (1) of the Act. The General Counsel's remedy for this violation is encompassed by the remedial order sought for the aforedescribed alleged violation of Section 8(a)(5).

Respondent contends that the withdrawal of recognition of the Union was lawful because the historic employing entity ceased to exist after the stock purchase by LOL. It argues that the old employing entity had permanently terminated its Spencer plant employees at the time of the plant closure, and that thereafter what occurred was the acquisition of the assets of the old employer by LOL, a new employer. It contends that the retention of what it calls the "shell" of the old S.F. corporation was a mere convenience to escape Federal tax liability. It argues that, despite its maintenance of the appearances of continued corporate life of the old S.F., to justify its representations to the Internal Revenue Service, that the National Labor Relations Board must subordinate form to substance and must look beyond appearances and accept its claim that for all material purposes under the Board's concept of an employing entity the old and new S.F. are separate and distinct entities. Respondent further argues that not only did the demise of the old S.F. occur, but that the S.F. that appeared thereafter as wholly owned by LOL and treated as an internal division by LOL was so disconnected from the old S.F. that it cannot be construed to be a successor employer. The Respondent argues that the employing industry in Spencer, Iowa, doing substantially the same business under the old name, at the same place, is not the same employing industry because of a total change in ownership, and almost total change in management, supervision, and most importantly, new employees. In support thereof, it cites *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and related cases. Respondent argues that the new S.F. had no employees when it commenced operations, that the old employees were permanently terminated by the old S.F., that the lengthy hiatus severed any thread of employment relationship, and that the new S.F. was entitled to hire new employees to suit its own business needs and desires. It argues that the new S.F. decided to hire new employes and not to avail itself of the old work force who was as a group unproductive, subject to high workers' compensation costs, and prone to excessive absenteeism. It contends that under nondiscriminatory criteria it hired a substantially new work force. Thus, it argues, it is not in the position of an employer who discriminatorily refuses to hire the old work force in order to avoid recognition of a union.[26] The Charging Party and the Union argue that the issues in this case are not properly analyzed under the criteria used by the court and the Board in successorship cases. They argue that no successorship occurred herein because there was no interruption in the continuity of the employing entity. They contend, however, that alternatively Respondent as a successor employee is heir to the same obligations as its predecessor.

The General Counsel and the Union cite certain Board precedent which holds that mere purchase of stock does not absolve an ongoing corporate business from its bargaining obligations.[27] Those cases involve, however, a continuity of operating and work force. The assertion that a mere stock purchase had occurred in this case is not accurate. More than a stock purchase occurred. In this case the stock purchase was accompanied by a sub-

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of the Union's leadership in causing slowdowns in support of grievances. He testified that some employees were not disciplined because of the supervisor's fear of "slowdowns and walkouts."

[25] Respondent submitted a document to the Regional Director in the investigation of this case which purports to set forth the reasons for rejecting former employees who applied for work. Respondent's witnesses gave confusing, if not conflicting, testimony as to whether the document contained accurate transpositions of file notations made by job applicant reviewers or mere summarizations, and whether the document contained all the reasons for rejecting a former employee, or only some of the reasons. The underlying data was admittedly destroyed by Human Resource Director Parks after he constructed the document for the proffered reason that he thought that it was not necessary to retain such data. I find his remarkable explanation most unconvincing in light of his extensive experience and responsibilities as a human resource manager which involves dealing with several governmental agencies with respect to the application of laws and regulation of the state and Federal Government.

[26] Cf. *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (1974).

[27] See, e.g., *Topinka's Country House*, 235 NLRB 72 (1978), enfd. 624 F.2d 770 (6th Cir. 1980); *Miller Trucking Service*, 176 NLRB 556 (1969); *Western Boot & Shoe*, 205 NLRB 999 (1973).

stantial change in management and supervision. The operations of the Spencer plant were modified. Some change in suppliers and customers occurred. More importantly, the stock purchase occurred at a time when S.F. employees had not actively worked at the plant for about a year.

The Board in *Hendricks-Miller Typographic Co.*, 240 NLRB 1082 (1979), herein *TKB*, delineated the distinction between successorship situation and a stock transfer. In the former, there is a substitution of employers, each having no connection or relation to one another, and where the former employer ceases to exist, or to have any relationship to the operations of the ongoing successor. The Board points out that despite this "break" or distinction in employers, bargaining obligations may transfer to the new employer if within a configuration of factors it appears that the "employing industry" continues, e.g., "continuity of operations, location, work force, working conditions, supervision, machinery, equipment, methods of production, and services." However, where a stock transfer occurs, the Board holds that there is a "difference in genesis from the successorship, for the stock transfer involves no break or hiatus between the two legal entities, but is, rather, the continuing existence of a legal entity, albeit under new ownership." The Board instructs that because the secondary characteristics of both situations are often identical the proper place to begin an analysis is an examination of the "primary characteristics" with the inquiry: "Did the two entities in question cease to have any relation, one to the other, or did ownership of the initial entity merely pass into new hands?"

In a situation where a business in bankruptcy and operated by a trustee had ceased to exist as an independent viable business entity but remained as a mere corporate shell and where after a 1-year hiatus under new ownership, new management, new supervision, a drastic reduction in work force, basic changes in production, extensive plant renovation, new product lines, new equipment, and new customers were effectuated, the Board rejected the contention that an alter ego analysis was applicable and held that a sounder analysis required application of the traditional successorship principles. In that context, the Board found no continuation of the same employing industry. *Cagle's, Inc.*, 218 NLRB 603, 605 (1975).[28]

In *Lauer's Furniture Stores*, 246 NLRB 360 (1979), a stock purchase analysis and alternative successorship analysis were both rejected by the Board where the old enterprise was kept alive only for the purpose of preventing a foreclosure of a lease but not to effectuate an ongoing business, and where none of the former employees were retained.

Thus, as Respondent argues, the Board does not mechanistically follow the outward appearances in analyzing whether a stock transfer or a successorship occurs. Respondent argues that the Board fully grasped the need for an analysis of substance over form, as Respondent suggests is mandated by the *Burns* decision, in its resolution of issues raised in *MPE, Inc.*, 226 NLRB 519 (1976). That case involved a transfer of stock after the expiration of one collective-bargaining agreement but prior to the execution of a succeeding contract. The old employer was in financial distress and considered dissolution and bankruptcy. The plant was seized by a governmental creditor for the purpose of making an inventory and was shut down. However, several individuals intervened and sought acquisition of the business. An assets purchased was considered as a vehicle for acquisition but because such manuever would have jeopardized a lease arrangement, a sale of stock was pursued which preserved the lease and allowed the seller to gain a profit on the sale of stock. After the stock sale the plant resumed operations after a hiatus of little over a month, with substantially the same production process and eventually employed a majority of the former employees. The Union was voluntarily recognized as bargaining agent.

The Board defined the issue in the *MPE* case as "whether a corporation which has undergone a complete change of ownership and management, but which has retained essentially the same employees, production process, and location, is bound to assume a labor contract of which it was not apprised at the time of the transfer of ownership." The Board stated (226 NLRB at 521):

> This case certainly involves more than a cosmetic change in the structure of the enterprise, and thus precludes a finding that the succeeding corporate entity is essentially but a mirror image of the predecessor. Instead, the factors of a complete change in management and ownership, the limited business options available to the parties to effectuate the transfer, and the absence of any evidence that the transfer was in any way illusory or fraudulent militate against a finding that either assent or even knowledge of the [new collective-bargaining agreement] should be ascribed to the new ownership and management.

The Board held that the corporate entity was not bound to assume the collective-bargaining agreement. The Board, however, did not find, as the Respondent claims, that the entity was not a successor, since that was not the issue.

In the *TKB* case, above, 240 NLRB 1082 (1979), the Board rejected the administrative law judge's application of a successorship analysis to the facts in that case. Instead, it applied a stock transfer analysis, wherein it cited the *MPE* case which involved a similar purchase of stock during the period between collective-bargaining agreements, except that in *TKB* the old entity was a member of a multiemployer bargaining unit. The Board stated (240 NLRB at 1085):

[28] See also *Blazer Corp.*, 236 NLRB 103 (1978), and *Radiant Fashions*, 202 NLRB 938 (1973), wherein the Board found that a lengthy hiatus, a purchase of assets rather than an ongoing business, the absence of a significant carryover in customers, and a difference in markets served, all revealed a lack of continuity of the employing industry and thus no successorship. But see *Schmutz Foundry & Machine Co.*, 251 NLRB 1494 (1980), and cases cited at 1496–1497, for the proposition that neither a hiatus in operations, nor substantial reduction of employees, nor change in size and scope of operations, although relevant, per se necessarily preclude a finding of successorship.

> It is clear that whether or not *MPE, supra*, would allow a respondent, within the circumstances of that case, to reject a contract not yet executed, such a respondent may not decline to recognize and bargain with the union in the appropriate unit.

In *TKB*, the administrative law judge found that the respondent therein had no obligation to execute the collective-bargaining agreement as a successor employer. The Board ultimately held that the respondent, although not a successor but a continuing entity, did not unlawfully refuse to execute the collective-bargaining agreement inasmuch as it had withdrawn from the multiemployer bargaining unit.

Although this case is factually complicated by the factors of a hiatus in operation at Spencer and nonactive employment of the former employees as well as other changes, I conclude that the same continuing employing entity existed throughout. I conclude that there was no severance in employing entities, nor substitution of employers, but that S.F. remained, despite new ownership and management, as the same employing entity.

I disagree that the stock purchase was a mere formal contrivance to cover an assets purchase. The corporate entity of S.F. existed after stock purchase not merely as a legal concept. Prior to stock purchase, S.F. as a corporation was an ongoing business enterprise. Albeit the Spencer plant was not operative, and several minor adjunct plants were unprofitable, S.F. was not a moribund venture, thanks to the 1000-employee operation in Schuyler. After stock purchase, S.F. continued the Schuyler operation unchanged. With respect to the other plants, under new ownership, it implemented a plan for profitable operations eventually as President Pearson had proposed, by, inter alia, disposing of the adjunct plants and reopening Spencer essentially with the changes he recommended. S.F. not merely continued in corporate name, but it continued to operate as an ongoing, viable business. While it may be true that LOL originally desired to effectuate a simple purchase of assets, what in fact occurred was the acquisition of an ongoing, employing entity by the purchase of its stock. The motivation for this type of acquisition, i.e., to escape tax liability, does not make it less real than if it were executed for any other reason, nor can it excuse responsibility under the National Labor Relations Act for obligations arising therefrom. Cf. *Miami Foundry Corp.*, 252 NLRB 2 (1980).

In no sense can S.F. be construed to have existed after stock purchase as a mere "shell." It existed as a functioning corporate business and continued to exist and function as a corporation, and continued to be governed by all laws, State and Federal, applicable to a corporation. Although special warranties relieved the corporation of certain pre-stock purchase liabilities, other liabilities were retained, and after the stock purchase the entity continued to be subject to new liabilities incurred as a corporation. LOL may in the future dissolve the corporation and administratively merge the business with its own, but at all times material herein S.F. continued as a distinct administrative as well as corporate entity despite internal nomenclature.

With respect to the collective-bargaining unit therein, i.e., the production and maintenance employees employed at the Spencer plant, I conclude that the unit did not cease to exist on the closure of the Spencer plant. I so conclude because I find that the employment relationship between S.F. and those unit employees were not permanently dissolved at plant closure. As evidenced by S.F.'s conflicting representations to employees and to various governmental agencies over a span of time, there was no fixed intent by the employer to permanently sever employees at plant closure. At best, S.F. had at the date of closure laid off its unit employees with the object of making such layoff permanent on condition subsequent that it sell its Spencer plant and sever the Spencer operation from its business. As seen from the factual analysis, the sale of the Spencer plant and its estrangement from S.F. was a short-lived plan. Contemporaneous negotiations with LOL occurred at the time of the closure. Those negotiations quickly evolved to the point where in a matter of weeks President Pearson was clearly attempting to effectuate a sale of an ongoing business enterprise of LOL, i.e., a business which encompassed the resumed operations of the Spencer plant by S.F. under new ownership.

Employees' perception of their status as temporary layoffs subject to recall was the inherent result of S.F.'s past representations and news media disclosures of the imminent reopening of the plant. The hiatus of closure was prolonged by negotiations for stock purchase and not by a decision to dispose of the Spencer plant. S.F.'s intent was to resume unit work. Within this factual context there is sufficient basis to infer that the unit employees retained an expectation of recall to their former jobs. Thus both employer and employees cannot be found to have viewed their relationship as permanently severed.

When the Spencer plant resumed operations, the unit work resumed. The changes in the operation of the Spencer plant, while obviously not cosmetic, were not changes of the essential nature of unit work, nor of the essential operations of the Spencer plant. Basically, the same work continued for the same corporate entity at the same place, with the same or substantially similar procedures, processes, and machinery, serving the same customers or same type of customers with much the same sources of supply.

I conclude that when LOL assumed ownership and control of S.F. it assumed ownership and control of an employing entity of which the relationship to its past unit employees at Spencer remained the same, i.e., it continued to remain the employer of unit employees who had been laid off for the purpose of a sale of the plant. I conclude that, on the stock acquisition, the sale of the Spencer plant, which had been abandoned as an objective, was no longer an impediment to the active employment of those employees. The only other conceivable impediment to their active employment during the hiatus was S.F.'s unwillingness to operate as it had in the past at the same level of wages and benefits that had been negotiated by the Union. That impediment could be removed by negotiation or by unilateral action. I reject the Respondent's argument that the expiration of the collec-

tive-bargaining agreement has any relationship to the continuing employment relationship. I conclude that, in December 1978 when recognition was withdrawn, S.F. was back in the same posture as an employer of the Spencer unit employees as it was on the day it decided to close the plant but that, under new ownership, the decision which precipitated the layoffs, i.e., to sell the plant, had been rescinded and replaced with a decision to resume unit work at Spencer. Therefore when S.F. refused to recognize and bargain with the Union concerning conditions of employment of unit employees, it did so in absence of any evidence of a loss of majority status, which status is presumed to adhere to the incumbent union, and accordingly it breached its bargaining obligations under the Act.[29] Furthermore, by the unilateral institution of new wage rates, benefits, and conditions of employment and by the unilateral institution of new employment criteria (which adversely affected the employment of laid-off unit employees) without first bargaining with the Union, the Respondent further violated its obligations under the Act regardless of the presence or absence of antiunion motivation for that criteria. I conclude that the only appropriate remedy in this case is a restoration of the status quo ante remedy, i.e., Respondent be ordered to reinstate preexisting wages, benefits, and conditions of employment and to recall the unit employees pursuant to past practice and as set forth in the expired collective-bargaining agreement. Cf. *American Gypsum Co.*, 231 NLRB 1291 (1977).

2. The 8(a)(3) violation

Respondent contends that it decided to hire new employees prior to the reopening of the Spencer plant because of a dissatisfaction with the low productivity, high absenteeism, and excessive workers' compensation costs of the old work force. Although concluding that the old work force as a whole was unsatisfactory, the Respondent asserts that it nevertheless decided to treat all job applicants, old and new applicants, equally and without prejudice by application of nondiscriminatory hiring criteria.

Ordinarily, motivation is determinative of whether Section 8(a)(3) of the Act has been violated. The Supreme Court has stated in *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33–34 (1967):

> Some conduct, however, is so "inherently destructive of employee interests" that it may be deemed proscribed without need for proof of an underlying improper motive. *Labor Board* v. *Brown, supra*, at 287; *American Ship Building Co.* v. *Labor Board, supra*, at 311. That is, some conduct carries with it "unavoidable consequences which the employer not only foresaw, but which he must have intended" and thus bears "its own indicia of intent." *Labor Board* v. *Erie Resistor Corp., supra*, at 228, 231. If the conduct in question falls within this "inherently destructive" category, the employer has the burden of explaining away, justifying or characterizing "his actions as something different than they appear on their face" and if he fails, "an unfair labor practice charge is made out." *Id.*, at 228. And even if the employer does come forward with counterexplanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the evasion of employee rights in light of the Act and its policy.

The Court further stated that "if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations."

Respondent herein closed its plant after it had been unable to obtain economic concessions from the Union, and after it had represented to its employees that they would be foreclosed from working unless the Union granted those concessions. Respondent explicitly told its employees that they would be out of work because of a labor dispute. It represented to state and Federal governmental agencies that it considered its employees to have engaged in a labor dispute which caused their unemployment. The Spencer plant was put up for sale but it was not sold. Rather, Respondent resumed operations but did not recall the employees despite the request of the Union for their reemployment. Respondent instead engaged in an extensive and arduous task of soliciting inexperienced workers from a wide geographic area and endured an onerous period of training those new workers. Respondent has thus engaged in conduct, the inherent and foreseeable effect of which tends to give its employees, job applicants, and the community the impression that it had not recalled employees to work because of their union representation and because of their past and continuing support of the Union's bargaining position which preceded the plant closure. By its own conduct, Respondent has created a situation whereby the failure to recall employees according to past practice has necessarily become inherently destructive of employees' rights under the Act to union representation and union activity. Under such circumstances, the burden of proving that the motivation for its conduct was economic must rest upon Respondent. Cf. *Saginaw Aggregates, Inc.*, 191 NLRB 553 (1971); *Rushton & Mercier Woodworking Co.*, 203 NLRB 123, 124 (1973); *Marquis Printing Corp.*, 213 NLRB 394, 402 (1974); *Allied Mills*, 218 NLRB 281, 289 (1975); *Smyth Mfg. Co.*, 247 NLRB 1139 (1980).

Additionally, the General Counsel has adduced sufficient evidence to support an inference that the employees' membership in, representation by, and support of the Union's bargaining position, i.e., maintenance of high wages and benefits, was at least a motivating, if not sole, factor in the formulation of the decision to hire a new work force under new employment criteria. According-

[29] For the proposition that an incumbent union's majority status is presumed, see *Automated Business Systems*, 205 NLRB 532 (1973); *Terrell Machine Co.*, 173 NLRB 1480 (1969); *Celanese Corp. of America*, 95 NLRB 664, enfd. 427 F.2d 1088 (4th Cir. 1970); see also *Barrington Plaza*, 185 NLRB 962 (1970), enfd. in relevant part sub nom. *Tragniew, Inc.*, 470 F.2d 667 (9th Cir. 1972).

ly, the burden shifted to Respondent to demonstrate that it would have decided to hire new employees under new criteria of employment in the absence of the old employees' membership in, support of, and representation by the Union. *Wright Line*, 251 NLRB 1083 (1980).

Based on the evidence in this record, I conclude that Respondent has not met its burden of proof. The record reveals that Respondent decided to reject the Union's request for recall of former employees at a point in time when it had no definitive information on which to conclude that the former employees were deficient in work effort, were prone to accidents inherently through their own fault, or were subject to higher absenteeism than that of the industry as a whole, or of the selective group of employees of those enterprises which it sought to purchase. At most, Respondent's decision-making agents possessed the November 1977 letter of S.F. President Pearson, supplemented by superficial "studies." Respondent relied on Pearson's representations in his November 1977 letter, but that letter does not support the conclusion that employees' deficiencies accounted solely or even primarily for the lack of profitability and productivity. Nor did his letter deal with the possible causes of accidents and absenteeism, i.e., employee negligence or willfulness, poor supervision, inadequate training, poor plant facilities, etc. Instead, the letter contains indictments of management as well as the physical faculties for the lack of profitability. Most importantly, Pearson's letter stressed the history of labor management conflict, and high labor costs as caused by low profits. He did not attack the ability of former employees as a whole, but rather their "Union versus Company attitude." Under the full factual context of this case, his prescription for success incorporating employees "on a free-standing basis" becomes apparent, i.e., Respondent under new ownership would achieve success and lower labor costs with employees unrepresented by a union and without the need to negotiate for less expensive wages and benefits with a union which on behalf of the employees has strenuously opposed such objectives. I conclude that Respondent has failed to establish that its rejection of the Union's request for recalling former employees as a group was motivated by a conviction that over 400 employees were undesirable workers, and failed to prove that it would not in any event have recalled most former employees even in the absence of their past membership in, representation by, and support of the Union. I conclude that the implementation of new employment criteria was the direct result of a decision not to hire most of the former employees in order to achieve lower labor costs by means of the avoidance of bargaining obligations imposed by the Act, and that former employees were discriminatorily refused employment pursuant to those new employment standards, and that Section 8(a)(3) and (1) of the Act was thereby violated. I conclude that the new employment standards were more restrictive than the employment tolerance level of Respondent prior to the plant closure, and that the application of those standards, either as set forth in the hiring criteria or in the judgments made by hiring personnel, was discriminatory under the Act regardless of whether they were applied equally to old and new employees alike, because those new standards were discriminatorily motivated. In any event, I conclude that the new standards of employment were applied less rigidly to new employees in support of a discriminatorily motivated decision to inhibit the hiring of as many former employees as possible. I therefore conclude that Respondent has violated Section 8(a)(3) and (1) as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Respondent is, and has been at all times material herein, the continuing and same employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers International Union, Local 152, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Since 1952, and at all times since material herein, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the following described unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All employees employed by Respondent at its Spencer, Iowa facility; excluding office and clerical employees, General Manager, Superintendent, Foremen, Livestock, Buyers, Livestock Buyer Trainees, Salesmen, Chief Engineer, Electronic Scale Maintenance Man, guards and supervisors defined in the Act.

4. By withdrawing recognition from the Union in December 1978 and by failing and refusing to recognize and bargain with the Union thereafter, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. By failing and refusing to bargain with the Union since December 1978, concerning the recall of laid-off bargaining unit employees, Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By unilaterally changing wage rates, benefits, and other terms and conditions of employment of the bargaining unit employees and by unilaterally establishing conditions and criteria for the eligibility of recall of bargaining unit employees since January 1979, Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

7. By establishing conditions and criteria for the eligibility for recall of said laid-off employees to disqualify most laid-off employees and pursuant thereto failing and refusing to recall most of its laid-off employees since January 1979 because of those employees' memberhship in, representation by, and activity in or on behalf of the Union, and in order to eliminate the Union as the employees' collective-bargaining representative, Respondent has engaged in unfair labor practices in violations of Section 8(a)(3) and (1) of the Act.

8. By its plant manager and agent Dennis Heineman on March 8, 1979, and by its agent William Huron in February 1979, the Respondent told employees that they

would not be employed in the future when work was available to them and when the employees were willing to work if they presently refused to cross the Union's lawful picket line, and thus engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in certain unfair labor practices, I find it necessary that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent has refused to recognize and bargain with the Union as the exclusive representative of the employees in the appropriate unit as described herein, I shall recommend that Respondent be ordered to recognize and, on request, bargain in good faith with the Union as the exclusive representative of the employees in the appropriate unit with respect to wages, hours, benefits, and all other terms and conditions of employment, and reinstate all wages, benefits, and other conditions of employment which existed prior to the unilateral action. Having found that Respondent refused to recall most of its laid-off Spencer plant employees pursuant to unilaterally established and discriminatorily effectuated conditions and criteria for recall, I find it necessary that Respondent be ordered to recall those laid-off employees who would otherwise have been recalled to available positions pursuant to the Respondent's past practice and pursuant to the appropriate provisions of the most recent collective-bargaining agreement and to make whole such employees and any other whole for any loss they may have suffered by reason of said failure to recall pursuant to past practice and the provisions of the most recent collective-bargaining agreement, and to make whole all employees, past and present, for any loss they may have suffered by reason of the unilateral changes in their wages, benefits, and other terms and conditions of employment. Backpay shall be computed in accordance with the formula set forth by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[30] Additionally, Respondent will be ordered to post an appropriate notice to employees.

[Recommended Order omitted from publication.]

[30] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

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